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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CALIFORNIA ENERGY COMMISSION;
CALIFORNIA PUBLIC UTILITIES COMMISSION;
DEPARTMENT OF WATER AND POWER OF THE
CITY OF LOS ANGELES;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF BURBANK;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF GLENDALE;
WATER & POWER DEPARTMENT OF THE CITY OF PASADENA;
PACIFIC GAS AND ELECTRIC COMPANY;
SOUTHERN CALIFORNIA EDISON COMPANY;
and SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioners,

vs.

BONNEVILLE POWER ADMINISTRATION;
JAMES J. JURA, as Administrator;
JAMES WATKINS, as Secretary of the
Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

February 4, 1991

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QUESTIONS PRESENTED

1. Whether a federal proprietary agency's interpretation of its governing statute is entitled to the same deference afforded to an independent regulatory agency when the proprietary agency's interpretation directly enables the agency to earn greater revenues than an alternative interpretation that is more consistent with the statutory language.

2. Whether the court of appeals erred in holding that the Bonneville Power Administration's Long Term Policy for allocating access to inter-regional power transmission lines, which gives Northwest utilities a clear preference in the allocation of federal transmission capacity, is consistent with the mandate of 16 U.S.C. § 838d that "any capacity in the Federal transmission system" that is not necessary to transmit federal power must be made "available to *all* utilities on a fair and nondiscriminatory basis."

LIST OF PARTIES

The parties to the proceeding below were petitioners California Energy Commission ("CEC"); California Public Utilities Commission ("CPUC"); Pacific Gas and Electric Company;[a] Department of Water and Power of the City of Los Angeles; Public Service Department of the City of Burbank; Public Service Department of the City of Glendale; Water & Power Department of the City of Pasadena; Southern California Edison Company;[b] and San Diego Gas & Electric Company;[c] and respondents Bonneville Power Administration ("BPA"), James J. Jura as Administrator of BPA; John S. Herrington as Secretary of the Department of Energy of the United States of America; and the United States of America.

In addition, the following Pacific Northwest entities were petitioners or intervened as petitioners in consoli-

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[a]Pacific Gas and Electric Company, a petitioner in this proceeding, has no parent holding company. Its non-wholly owned subsidiaries are: Alberta Natural Gas Company Ltd.; ANG Liquids Ltd.; ANG Processing Ltd.; ANG Realty Ltd.; ANG Resource Marketing Ltd.; CanStates Holdings Inc.; ANGUS Chemical Company; ANGUS Chemie GmbH; ANGUS Fine Chemicals Ltd.; ANGUS International Ltd.; CanStates Energy Inc.; CanStates Hydrocarbons Inc.; Rankin Petroleum Inc.; Foothills Pipe Lines (South B.C.) Ltd.; International Permeation Inc.; Magnesium Company of Canada Ltd.; PG&E-Bechtel Generating Company; Standard Pacific Gas Line Incorporated.

[b]Southern California Edison Company, a petitioner in this proceeding, is a wholly-owned subsidiary of its parent holding company SCE Corp. Southern California Edison Company has no non-wholly owned subsidiaries.

[c]San Diego Gas & Electric Company, a petitioner in this proceeding, has neither a parent company nor any non-wholly owned subsidiaries.

dated proceedings to review Bonneville's Long Term Intertie Access Policy: Puget Sound Power & Light Company; Washington Water Power Company; Pacific Northwest Generating Company; Vanalco, Inc.; Aluminum Company of America; and Columbia Falls Aluminum Company.

The following Pacific Northwest parties intervened as respondents in the proceedings below: Association of Public Agency Customers; Public Power Council; Public Utility District No. 1 of Chelan County, Washington; Pacificorp, dba Pacific Power and Light Company; Public Utility District No. 2 of Grant County, Washington; Western Public Agencies Group; Montana Power Company; City of Seattle, City Light Department; Public Generating Pool; Eugene Water & Electric Board; Direct Service Industrial Customers; Portland General Electric Company; ARCO; Nongenerating Public Utilities; and Northwest Power Planning Council.

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& Electric Company petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 909 F.2d 1298 (9th Cir. 1990) ("*CEC II*") and reproduced at Appendix A. The opinions in two earlier related cases, *California Energy Resources Conservation and Development Commission* v. *Bonneville Power Administration*, 831 F.2d 1467 (9th Cir. 1987), cert. denied, 488 U.S. 818 (1988) ("*CEC I*"), and *Department of Water and Power of the City of Los Angeles* v. *Bonneville Power Administration*, 759 F.2d 684 (9th Cir. 1985) ("*LADWP*"), are reproduced at Appendices B and C, respectively.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion and judgment on July 26, 1990. The court denied a petition for rehearing on October 5, 1990. App. D4. On December 21, 1990, Justice O'Connor entered an order extending the time within which to file this petition to and including February 4, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PRINCIPAL STATUTES INVOLVED

Section 6 of the Act of August 31, 1964, 16 U.S.C. § 837e, provides in pertinent part:

> Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or with

> any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy [or Canadian Treaty energy], shall be made available as a carrier for transmission of other electric energy between such areas.

Section 6 of the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. § 838d, provides in full:

> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

STATEMENT OF THE CASE

The Bonneville Power Administration ("BPA") is a federal power marketing agency within the Department of Energy. It has two essential purposes: (1) to market electric power produced by federally-owned generators, primarily from a system of dams on the Columbia River, and (2) to build and operate power lines to transmit federal and non-federal power to markets within and outside the Northwest. 16 U.S.C. §§ 832-832l, 837-839h. App. A4. This case involves BPA's administration of the northern portion of the "Pacific Intertie," a system of power lines that link the Pacific Northwest with California and Canada.

1. *The Pacific Intertie.* As the court of appeals explained, "[i]t is useful to think of the Intertie as a pipeline in which electricity flows." App. C3-C4, n.4. BPA owns and operates virtually all of the northern portion of the Pacific Intertie. *Id.* at C3. South of the Oregon border, the Intertie is owned and used by several California

utilities and public agencies, many of which are the petitioners here.[1] In order to consummate mutually beneficial sales and exchanges of electric power, buyers and sellers in the Northwest, Canada, and California must have access to the Intertie.

Because access to the federal portion of the Intertie is vital for both public and private entities, Congress was very clear in how it wanted the Intertie allocated. Congress gave BPA an absolute preference for all federal Intertie capacity needed to transmit federal energy. 16 U.S.C. § 837e.[2] But Congress provided that all *excess* capacity was to be made available to "*all* utilities on a fair and nondiscriminatory basis." 16 U.S.C. § 838d (emphasis added). Thus, all non-federal users were to have equal access to BPA's Intertie. Congress authorized neither discrimination between buyers and sellers nor discrimination among the three regions.

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[1]The California portion of the Intertie was built by three private and four municipal utilities and primarily funded by their ratepayers: Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, Department of Water and Power of the City of Los Angeles, and the public utility departments of the Cities of Burbank, Glendale, and Pasadena. These owners share some of their capacity under long-term contracts with the California Department of Water Resources, the Sacramento Municipal Utility District, and the Western Area Power Administration (which, like BPA, is a federal power marketing administration with some Intertie-related transmission lines of its own). Charts presented to Congress depicting the shares of the Intertie, as of 1987 and after planned expansions, are reproduced in the Appendix. App. F1-F2.

[2]A similar preference was given to "Canadian Treaty Energy," Canada's share of power generated in the United States as a result of regulation of the Columbia River in Canada. App. C21. For purposes of this petition, references to the preference for federal energy include Canadian Treaty Energy.

For twenty years after Congress authorized the Intertie, BPA interpreted these statutes in accordance with their plain meaning: BPA reserved the capacity it needed to transmit federal energy, but it made the remaining capacity available on a first-come, first-served basis to utilities that had successfully negotiated transactions. App. B5; C6-C7. When Northwest energy was scarce, California buyers would compete to purchase it, and the price would rise. But when Northwest energy was plentiful, competition among sellers meant that prices would fall.[3]

2. *The BPA's Intertie Access Policies.* In September 1984, BPA adopted the first of a series of Intertie Access Policies, all of which were designed to prevent competition among sellers and enable BPA to raise the price of electricity sold to California. App. C9. Although it justified the first (or "Interim") policy on the need to increase federal revenues, BPA did not simply promote that interest by enforcing its own statutory right to use the Intertie for federal energy ahead of other users. Instead, BPA

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[3]The only exception to this competitive method for allocating the market occurred during periods of "spill." "Spill" exists when Northwest dams are overflowing, Northwest demand is fully met, and surplus hydroelectric energy must either be generated immediately for short-term sales outside the Northwest or the water's electric generative potential will be wasted. App. A7 n.1. Until 1984, BPA allocated its Intertie capacity during spill under the "Exportable Energy Agreement," a contractual arrangement between BPA and all the generating utilities in the Northwest. That agreement provided for pro rata allocation of the federal Intertie among all Pacific Northwest sellers, with an important caveat: all of the energy sold over BPA's Intertie was sold as federal energy at BPA's lowest nonfirm energy rate. See *California Energy Comm'n* v. *Johnson*, 767 F.2d 631, 634 (9th Cir. 1985). This arrangement protected sellers from competition only during spill conditions; it also protected buyers from abuse of that competitive restriction through a price cap.

adopted a policy that (1) placed both BPA's energy *and the energy of all other Pacific Northwest energy sellers* ahead of any other utility's use of the Intertie and (2) restricted competition, not only against BPA, but also *among the non-federal Northwest sellers*. Thus, through a horizontal market allocation mechanism, BPA categorically discriminated against California. Moreover, it did so in a way that would significantly increase the price for surplus energy that petitioners must pay, not only to BPA, but also to Northwest utilities. The Interim Policy was followed by a "Near Term" Policy in June, 1985, and a "Long Term" Policy in May, 1988.

All three Policies allocated federal Intertie capacity for short-term energy sales on an hourly basis. The Long Term Policy calls this "Formula Allocation." App. E35-E38. The allocation method changes depending on which of three "conditions" exists at any given time.

Under Condition 1, which occurs during times of spill (see *supra* note 3), each Northwest seller (including BPA) receives a fixed share of the Intertie based on its pro rata share of the total energy declared by Northwest utilities and BPA as available for sale to California. App. A7, B6, C12. BPA, moreover, permits Northwest utilities to sell at any price they can get.[4] Because each seller is allocated a fixed share of the Intertie, all sellers can raise their prices without fear of competition from others. App. B15-B16.

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[4]In this crucial respect — the abolition of any protection of buyers through a price cap — the Policy differs from the pre-1984 Exportable Energy Agreement that previously governed access to the Intertie during spill conditions. See *supra* note 3. In most other respects, the rules applicable under Condition 1 are similar to the rules established by that agreement.

The rules under Condition 2, which exists when spill is not imminent but Northwest energy sellers still declare that they have sufficient surplus energy to fill all available capacity on the Intertie, are essentially the same as under Condition 1. App. B6. Under both Conditions 1 and 2, Canadian and California utilities are denied any access to the federal Intertie.

Condition 3 exists when BPA and non-federal Northwest utilities lack sufficient surplus to fill the Intertie. Under Condition 3, BPA apportions the capacity of the Intertie first to itself and to Northwest utilities so that each receives a fixed share sufficient to carry all its surplus energy. Any remaining capacity is then, and only then, made available to utilities outside the Northwest. App. B6.

A study commissioned by Pacific Gas and Electric Company ("PG&E"), and presented to BPA in comments on the final draft of the Long Term Policy, demonstrates that the price PG&E had to pay to non-federal Northwest utilities as a result of the temporary Access Policies increased by approximately 10 mills/kWh (1 cent per kilowatt hour). PG&E, Comment No. 3-188 (LTIAP Record), Appendix at 4. BPA never disputed this estimate. Given the estimated 11.5 billion kWh that non-federal utilities in the Northwest sold to California in 1985,[5] the Policy therefore caused a transfer of approximately $115 million from consumers in California to non-federal utilities in the Northwest during that one year alone.

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[5]BPA sold 17.3 billion kWh in 1985, and the agency assumes that this is about 60 percent of the total Northwest surplus energy sold to California. BPA, 1985 Program and Financial Summary 33 (1985); App. E247. Thus the total Northwest surplus that year was about 28.8 billion kWh and the non-federal share was about 11.5 billion kWh.

3. *Ninth Circuit Review of the Policies.* The Ninth Circuit reviewed the Interim Policy and upheld it in *Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration,* 759 F.2d 684 (9th Cir. 1985) *("LADWP").* App. C1 to C24.[6] In that decision, the court focused on the Policy's limitation of competition against *BPA's* sales, and held that, if it protected BPA's ability to collect sufficient revenue, the restriction was not only authorized, but mandated. App. C19. The court also held that section 838d, which requires BPA to share excess capacity with "all" utilities on a fair and nondiscriminatory basis, applies only to Northwest utilities, and therefore does not prohibit discrimination against Canadian sellers and California buyers. App. C24. In the court's view, the BPA's governing statutes mandate a preference in favor of Northwest utilities, not just for sales of federal power, but for transmission capacity as well. *Id.*

When it later reviewed the Near Term Policy, the Ninth Circuit recognized that the Policy protected not only BPA, but also non-federal sellers, from competition. *California Energy Resources Conservation and Development Commission v. Bonneville Power Administration,* 831 F.2d 1467 (9th Cir. 1987), cert. denied, 488 U.S. 818 (1988) *("CEC I").* App. B1-B25. The majority candidly acknowledged the anticompetitive nature of the Near Term Policy's allocation scheme:

> The result is a regularly shifting, horizontal division of the market for surplus nonfirm energy [whereby] each eligible producer is temporarily granted sole access to a specified share of

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[6]The Ninth Circuit exercises original jurisdiction to review the final actions of BPA pursuant to 16 U.S.C. § 839f(e)(5).

> the capacity, which it may either use or allow to remain unused without fear of competition by other producers.

App. B15-B16. Nevertheless, the court in *CEC I* upheld the Near Term Policy because more competitive alternatives had not been proposed to BPA in comments on the temporary policies. Accordingly, the court reasoned that consideration of such alternatives should await review of the Long Term Policy. App. B16-B17. The majority also concluded that it was bound by the conclusion of the panel in *LADWP* that BPA was required to discriminate against utilities outside the Northwest in providing access to excess transmission capacity. App. B14.

Judge Norris sharply disagreed:

> The BPA's pro rata allocation scheme for available intertie capacity — a scheme which if implemented by a private party would plainly violate the antitrust laws — paternalistically restricts price competition among Northwest utilities and denies Southwest utilities and energy consumers the benefit of free market pricing for surplus energy offered for sale by privately-owned Northwest utilities. . . .
>
> I can see no statutory authority under which the BPA is authorized to discriminate so clearly in favor of Northwest utilities and against Southwest utilities and energy users. Indeed, the relevant statutory language appears to point the other way. The anticompetitive, pro-Northwest utility slant of the pro rata intertie access plan seems plainly incompatible with the statutory language requiring that the BPA be "fair and nondiscriminatory" in its treatment of *all* utilities, 16 U.S.C. § 838d, as well as the clear under-

> standing recognized in *Department of Water & Power* that the purpose of the intertie was to benefit both the Northwest and Southwest, 759 F.2d at 694.

App. B24-B25. (emphasis in original; footnote omitted).[7]

Although the majority in *CEC I* had deferred review of the Near Term Policy's allocation scheme to permit BPA to consider comments suggesting less anticompetitive alternative means of protecting its revenues, BPA adopted the Long Term Policy without responding to those comments.[8] The Ninth Circuit, in *California Energy Commission* v. *Bonneville Power Administration,* 909 F.2d 1298 (9th Cir. 1990) (*"CEC II"*), nonetheless upheld the Long Term Policy without addressing this failure. The court agreed that BPA has a duty to consider federal antitrust policy, but found that "BPA may allocate Inter-

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[7]The CEC and the CPUC sought review by this Court of the Ninth Circuit's divided decision on May 4, 1988. On May 17, 1988, however, BPA issued its Long Term Policy. For that reason, the Solicitor General, in opposing the petitions for certiorari on behalf of BPA, argued that the challenge to the Near Term Policy "is, in most respects, now moot." Brief for the Respondents in Opposition (No. 87-1835) at 10. The Solicitor General suggested that "the proper course is [for petitioners] to raise whatever objections they still have in a new proceeding" seeking review of the Long Term Policy. *Id.* at 11. This Court denied certiorari on October 3, 1988. *CEC I,* 488 U.S. 818 (1988).

[8]The CEC, for example, pointed out to BPA that if, as BPA contended, competition among non-federal energy sellers would reduce federal revenues indirectly, that revenue loss could be made up by simply allocating a slightly greater than pro rata share of the Intertie to BPA in accordance with the statutory preference for federal energy. CEC, Comment No. 3-218 (LTIAP Record), at 44 & n.44, 48. BPA ignored this comment and adopted the anticompetitive fixed allocations instead.

tie capacity on a pro rata basis to satisfy the demands of its governing statutes." App. A21. Without finding that the fixed, pro rata allocations were in fact necessary to satisfy those statutes, the court ultimately upheld the Policy's allocation scheme based on its view that BPA could reasonably be concerned for the welfare of small Northwest utilities who might find it hard to compete with larger utilities and who therefore might be forced to spill energy. App. A22-25.

The Ninth Circuit also held that the Long Term Policy did not contravene section 838d. App. A25-A26 n.14. Addressing the standard for reviewing BPA's interpretation of its governing statutes, the court acknowledged BPA's direct financial interest in the allocation of excess Intertie capacity. App. A13. It also acknowledged the decision of the District of Columbia Circuit in *National Fuel Gas Supply Corp.* v. *FERC,* 811 F.2d 1563, 1571 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987), indicating that an agency is not entitled to full deference in such circumstances because "if the agency itself were an interested party . . . deference might lead a court to endorse self-serving views . . ." App. A13. However, the court in *CEC II* stated that it "disagree[d]" with the District of Columbia Circuit's analysis (*id.*), and held that BPA's interpretation "should be upheld if reasonable." App. A12. Based on this deferential standard of review, the Ninth Circuit upheld BPA's interpretations, including the view that "all utilities" in Section 838d means all *Northwest* utilities. App. A20-A28.

REASONS FOR GRANTING THE WRIT

This "obviously important case"[9] involves the transfer of billions of dollars of wealth from electric utilities and consumers in California to electric utilities in the Pacific Northwest. See *supra* p. 7. The transfer occurs because BPA's Intertie Access Policy eliminates competition among Northwest utilities for the sale of short-term energy to California, and refuses to make excess capacity available to other utilities who would also supply the California market if they could gain access to the federal portion of the Intertie.

This Court's review is required for three reasons. First, the Ninth Circuit's highly deferential review of BPA's statutory interpretations presents a conflict between the Ninth and District of Columbia Circuits as to the appropriate standard of review when a proprietary agency's interpretation may be self-serving. Second, the plain language of the governing federal statutes expressly prohibits discrimination in allocating the capacity of the Intertie. Yet the Ninth Circuit — the only court of appeals with jurisdiction over BPA's decisions — has violated well-settled principles of statutory construction by relying upon ambiguous legislative history to override the plain meaning of the statute. Third, the decision below will have an enormous financial impact on California consumers. Given the lower court's clear errors of law, and "in light of the economic interests at stake," certiorari should be granted. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Companies,* No. 89-1452 (Jan. 8, 1991), slip op. at 2.

1. As a general rule, federal administrative agencies are entitled to deference in interpreting their governing

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[9] *CEC I,* App. B24 (Norris, J., dissenting).

statutes. To be upheld on review, an agency's interpretation generally must only be reasonable, not necessarily consistent with the court's own view. See, *e.g., Chevron USA* v. *NRDC,* 467 U.S. 837, 843 (1984). However, most federal agencies are not proprietary operations, and therefore generally do not have any direct and immediate financial interest in their own decisions. The decision below presents the issue whether the *Chevron*-style deference generally applied to agency interpretations is fully applicable where, as here, the agency does have such a direct financial stake.

The court below squarely held that deference is required in this situation. The court acknowledged that the BPA "has an economic interest in obtaining a larger share of the economic benefits of interregional transactions" facilitated by the Intertie. App. A13. However, it flatly rejected petitioners' argument that this meant that "BPA should be afforded less deference here." App. A13. Instead, it held that BPA's interpretation "should be upheld if reasonable." App. A12. This holding was critical to the court's decision (1) ignoring the plain language of Section 838d (requiring that excess Intertie capacity be allocated to "*all* utilities on a fair and nondiscriminatory basis") and (2) upholding instead the BPA's effort to rewrite the statute to benefit itself and Northwest utilities at the expense of California consumers. See App. A22-A25; see also App. B14, B24-B25; C24.

The court's resolution of the deference issue warrants review for two compelling reasons. *First,* it presents an acknowledged disagreement among the circuits. In *National Fuel Gas Supply Corp* v. *FERC,* 811 F.2d 1563 (D.C. Cir. 1987), for example, the District of Columbia Circuit noted several "circumstances in which deference would be inappropriate." *Id.* at 1571. Describing one of

those circumstances, the court stated "[I]f the agency itself were an interested party . . . deference might lead a court to endorse self-serving views that an agency might offer . . ." *Id.* After quoting this passage, the court below simply stated, "We disagree." App. A13.[10]

This disagreement between the Ninth and District of Columbia Circuits reflects a conflict between those courts (as well as among other circuits) on the more general question of whether an agency is entitled to deference when it has a substantial incentive — pecuniary or otherwise — to adopt a biased interpretation of its governing statute. For example, the District of Columbia Circuit and the Eighth Circuit have held that an agency is not entitled to *Chevron*-style deference when interpreting the scope of its own authority. *E.g., Ohio Power Co.* v. *FERC,* 880 F.2d 1400, 1405 (D.C. Cir. 1989) (refusing to defer to FERC interpretation of jurisdictional provision of Federal Power Act), *rev'd on other grounds sub nom Arcadia, Ohio* v. *Ohio Power Co.,* 111 S.Ct. 415 (1990); *New York Shipping Ass'n* v. *FMC,* 854 F.2d 1338, 1363 & n.9 (D.C. Cir. 1988) ("it would also be inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction"), cert. denied, 109 S.Ct. 866 (1989); *Missouri* v. *Andrews,* 787 F.2d 270, 286-87 (8th Cir. 1986) (refusing to defer to interpretation by Secretary of Interior of Section 9(c) of Flood Control Act), *aff'd on other*

---

[10]Not only may BPA's interpretations of these statutes be financially "self-serving," but such interpretations are also suspect because they implement a congressionally recognized BPA bias in favor of the Northwest and against consumers and utilities outside the Northwest. See *Southern California Edison Co.* v. *FERC,* 770 F.2d 779, 784 (9th Cir. 1985).

grounds sub nom ETSI Pipeline Project v. *Missouri,* 484 U.S. 495 (1988). The Third and Ninth Circuits, by contrast, have held that deference *is* required in reviewing an agency's interpretation of its own authority. *E.g., Puerto Rico Maritime Shipping Auth.* v. *Valley Freight Sys.,* 856 F.2d 546, 552 (3d Cir. 1988) (the "rule of deference is fully applicable to an agency's interpretation of its own jurisdiction"); *Wyckoff Co.* v. *EPA,* 796 F.2d 1197, 1200-01 (9th Cir. 1986) (same). In *Arcadia, Ohio* v. *Ohio Power, supra,* this Court granted certiorari on this precise question (see 58 U.S.L.W. 3620 (1989)), but ultimately did not reach it on the merits.

Second, the court of appeals' resolution of this issue has substantial importance beyond this case. Congress has established a number of federal proprietary agencies. Examples include the Federal Home Loan Mortgage Corporation, the Student Loan Marketing Association, the Overseas Private Investment Corporation, the Export-Import Bank, the Tennessee Valley Authority, and five power marketing agencies (of which BPA is the largest). Unlike most government agencies, these institutions are businesses.[11] Most of them compete, in one way or another, with other private and public institutions in pursuing their commercial interests. As this case illustrates, blind application of *Chevron*-style deference to

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[11] *E.g.,* 12 U.S.C. § 1454(a)(1) (authorizing Federal Home Loan Mortgage Corporation to "hold and deal with, and sell" home mortgages and interests in home mortgages); 22 U.S.C. § 2191(c) (authorizing Overseas Private Investment Corporation to "sell[] its direct investments to private investors whenever it can appropriately do so on satisfactory terms"); 12 U.S.C. § 635(a)(1) (authorizing Export-Import Bank "to do a general banking business except that of circulation"); 20 U.S.C. § 1087-2(d)(1)(B) (authorizing Student Loan Marketing Association to "buy, sell, hold, underwrite, and otherwise deal in" certain education-related financial instruments).

every decision by a proprietary agency could well permit those agencies to achieve an unfair and unauthorized advantage in markets where they (or their principal constituencies) operate.[12] Accordingly, this issue is a recurring one that implicates important economic concerns and basic notions of fairness. It therefore warrants review by this Court.

2. The decision below also warrants review because it conflicts with both the plain language of the relevant statutes and this Court's decisions on the proper role of legislative history. Congress has expressly required BPA to make all Intertie capacity that it does not need for transmission of federal energy available "as a carrier" to "*all* utilities" on a "fair and nondiscriminatory" basis. 16 U.S.C. §§ 837e, 838d (emphasis added). The Long Term Policy violates that command by granting priority to Northwest utilities and shielding them from competition in their transactions with California buyers.[13]

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[12]Of course, in a given context, a court may conclude that a proprietary agency does not have a sufficiently direct and immediate financial stake in the interpretation of its governing statute to place in doubt the objectivity of the agency. *E.g., Aluminum Co. of America* v. *Cent. Lincoln Peoples' Util. District*, 467 U.S. 380 (1984) (involving a dispute between two BPA customer groups over their relative priority to receive certain BPA power). Petitioners do not challenge the application of *Chevron*-style deference in that circumstance. In this case, however, the Ninth Circuit has fully recognized that BPA's financial interest is direct and immediate (App. A13, C19) — indeed, BPA's need for revenues has been the principal justification the agency has offered for the Policy (App. B13 & n. 2, C9, E63-E65) — and yet the Ninth Circuit simply disagreed with the proposition that this could provide any reason for a court to accord less deference to the agency's interpretation.

[13]Petitioners recognize that there is no circuit conflict with respect to the interpretation of these specific statutory provisions. However, as the Solicitor General recognized in its brief in *CEC I*, "the

Sections 837e and 838d provide a two-tiered preference for power transmission: first, transmission of federal energy and Canadian treaty energy, and second, transmission of all other non-federal energy. The BPA and the Ninth Circuit, however, found in the statutes a three-tiered preference: first, BPA and utilities desiring to transmit Canadian treaty energy; second, Northwest non-federal utilities; third, utilities located outside the Northwest, including those in California and Canada. App. C24. Neither the language of the statute nor its legislative history supports this judicial attempt at legislation, which gives Northwest utility sellers a preference over non-Northwest sellers and over California buyers in the transmission of electricity over the federal portion of the Intertie. Indeed, when Congress meant for BPA to favor one region over another in the *sale of power*, it knew how to provide that directive and it and did so directly. See 16 U.S.C. §§ 837(c), 837a. No comparable directive exists in the statutes for *allocation of transmission*.

Rather than implementing the plain meaning of the statutes quoted above, the decision in *LADWP* (which the panel in the present case deemed binding (App. A25-A26 n.14)) redefined BPA's statutory authority by transforming the phrase "all utilities" in Section 838d to "all Northwest utilities." It justified this result primarily on the basis of two passages of legislative history.

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exclusive jurisdiction granted to the Ninth Circuit by 16 U.S.C. § 839f(e)(5) makes this an area of the law in which such conflicts inherently do not develop . . ." Brief for Respondents in Opposition (No. 87-1835) at 10. Indeed, this Court has previously granted review of a Ninth Circuit decision interpreting BPA's governing statute despite the absence of a conflict among the circuits. *Aluminum Co. of America* v. *Cent. Lincoln Peoples' Util. District*, 467 U.S. 380 (1984).

First, the court selectively quoted the legislative history of section 837e as follows:

> [BPA] *may enter into agreements* for the wheeling of energy generated in Canada, but such energy . . . does not have the priority granted to Federal energy and Canada's entitlement to [treaty] power benefits . . . .

App. C21 (emphasis, ellipses, and brackets in original). The court concluded that this language allows BPA to discriminate against Canadian non-treaty energy. App. C22.[14] In reaching that conclusion, however, the court in *LADWP* edited the legislative history's language in a way that turns the intended meaning of the statute on its head. The *unedited* language shows that Congress's intent was exactly the opposite of the intent the court found:

> [BPA] may enter into agreements for the wheeling of energy generated in Canada, but such energy *stands on the same basis as any other non-Federal energy. It* does not have the priority granted to Federal energy and Canada's entitlement to [treaty] power benefits . . . .

H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3342, 3350 (emphasis added

[14]The Ninth Circuit also stated that the use of the word "may" in the above-quoted statement "is in contrast to the immediately prior paragraph in the legislative history which *requires* BPA to make excess Intertie capacity available to other non-Federal utilities." App. C21. (emphasis in original). The "prior paragraph," however, in fact makes no distinction between Canadian non-treaty and other non-federal energy. H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Cong. & Ad. News 3342, 3350. Rather, that paragraph deals with Congress's intent concerning how BPA should provide long-term arrangements for transmission.

to the portion omitted by the Ninth Circuit). Thus, Congress expressly indicated, in the very passage on which the court in *LADWP* purported to rely, that Canadian energy was not to be treated any differently from any other non-federal energy.[15]

Second, the court noted that the House Report discussing section 838d states that the statutory requirement for "fair and nondiscriminatory" access for "all" utilities "is not intended to represent a policy having application other than in the Pacific Northwest." App. C22 (quoting H.R. Rep. No. 93-1375, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5810, 5814). However, the parallel Senate Report makes the meaning of this statement crystal clear: Congress intended that the duty not to discriminate would apply only to *BPA's* transmission lines (all of which are within the Northwest), and would therefore not affect the obligations of federal power marketing agencies operating outside the Northwest.[16]

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[15]Similarly, the court's view that such discrimination is justified by the fact that "Congress intended that the Intertie be used primarily for the benefit of Northwest and Southwest utilities and not for the benefit of Canadian utilities" (App. C22) is flawed. As Judge Norris noted, "the exclusion of Canadian power, arguably unobjectionable in its discrimination against Canadian producers, discriminates against Southwest energy purchasers — intended beneficiaries of the intertie." App. B24 n.1.

[16]The Senate Committee Report states:

> Section 6 provides that the Administrator of the Bonneville Power Administration shall not discriminate among classes of customers in making agreements to transmit electric power over Federal transmission lines. The intention of this provision is to enable the Administrator to carry out the responsibilities assigned to him in this measure. *It is not the Committee's intention to make an expression of Congressional*

Aside from the Ninth Circuit's distortion of the legislative history, the court's reliance on that inconclusive history to override the plain statutory language conflicts with this Court's decisions. This Court has long held that "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case there is no clear Congressional intent to limit the application of the nondiscrimination requirement of Section 838d to utilities in the Northwest. After all, the plain language says "*all* utilities," not "all Northwest utilities." Because "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises*, 109 S.Ct. 1026, 1030 (1990) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).

At most, the passages of legislative history upon which the Ninth Circuit relied reflect general views about the scope of the statutes at issue, rather than any specific intent to limit the reach of Section 838d's non-discrimination provision to Northwest utilities. But, as this Court has held, "generalizations [in legislative history] are inadequate to overcome plain textual indication." *United Savings Ass'n* v. *Timbers of Inwood Forest Associates*, 484 U.S. 364, 380 (1988). Moreover, as this Court held in *Garcia* v. *United States*, 469 U.S. 70, 78 (1984), a reviewing court should not "narrow the plain meaning of [a] statute on the basis of a gestalt judgment as to what Congress probably intended." That, however, is exactly

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policy regarding the transmission of energy over Federal systems outside of the Pacific Northwest.

Sen. Rep. No. 93-1030, 93d Cong., 2d Sess., at 10 (1974) (emphasis added).

what the Ninth Circuit has done here in narrowing the phrase "all utilities" to mean "all Northwest utilities."[17]

In short, the Ninth Circuit's interpretation of Section 838d, which not only misreads the legislative history but also flouts well-settled principles of statutory construction, plainly warrants this Court's review. That review is particularly important in light of the fact that the Ninth Circuit is the only court of appeals with jurisdiction over BPA decisions. Only this Court can correct the Ninth Circuit's grave misinterpretation of this important statutory protection.

3. Finally, the decision below warrants review because of its tremendous economic impact. See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Companies*, No. 89-1452 (Jan. 8, 1991), slip op. at 2. The BPA Formula Allocation scheme is, at bottom, a "horizontal division of the market for surplus nonfirm energy"

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[17]The Ninth Circuit has also ignored the plain meaning of Section 837e in its decision to uphold the "Assured Delivery" provisions of the Long Term Policy. In those provisions, BPA limits the amount of long-term transmission service that it will make available even when that service can be provided from excess Intertie capacity. The court holds that "there is no requirement in the governing statutes that BPA provide *any* access on a firm basis." (emphasis added) App. A27. Yet Section 837e requires BPA to make available "[a]ny capacity in Federal transmission lines . . . which is not required for the transmission of Federal energy," and BPA can provide transmission on a firm basis without disrupting the transmission of its own energy. The effect of this ruling is to render impossible long-term arrangements between Northwest and California utilities, such as seasonal power exchanges, which take advantage of the fact that peak demands for electricity in the two regions occur at different times of the year. These exchanges were one of the principal reasons Congress authorized construction of the Intertie. *LADWP*, App. C3; H.R. Rep. No. 590 88th Cong. 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3342, 3343.

sold by the very Northwest utilities that are the BPA's principal political constituency. App. B15-B16. For this reason, as Judge Norris recognized, that scheme "would plainly violate the antitrust laws" if it were "implemented by a private party." App. B24 (Norris, J., dissenting). The BPA, which has a duty to consider antitrust concerns (*e.g., Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 759 (1973)), utterly failed to give these consequences of its Policy the consideration or the weight they required.[18]

The costs of this BPA-created cartel to California electricity consumers are enormous. An estimate submitted to (and never disputed by) the BPA found that the price paid for surplus power to non-federal Northwest

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[18]As explained above (*supra* p. 5), the BPA's principal justification for the Formula Allocation scheme was a desire to protect, and indeed, increase its own revenues. At the invitation of the Ninth Circuit in *CEC I* (App. B16-B17), Petitioners proposed several alternatives that would have generated the same amount of federal revenue without adverse competitive consequences. *Supra* note 8. However, the BPA, with the *CEC II* court's approval, did not expressly consider these alternatives or explain its reasons for rejecting them. This was a plain violation of the requirement of reasoned decisionmaking (*Walter O. Boswell Memorial Hosp.* v. *Heckler*, 749 F.2d 788, 797 (D.C. Cir. 1984); 42 U.S.C. §§ 7152(a)(1)(D) & (a)(2), 7191(a)(1) and (d)), notwithstanding the Ninth Circuit's conclusion that the BPA gave *some* consideration to antitrust concerns.

The Ninth Circuit's view that BPA's anticompetitive Policy is justified by BPA's concern for the welfare of small Northwest utilities is also flawed. App. A23-A25. Even if there were a statutory justification for this preference (which there is not, see *supra* pp. 16-21), the BPA itself only cited this concern as a justification for pro rata allocations under spill conditions. App. E136. It is plainly not necessary to restrict competition throughout the year, as the Long Term Policy does, in order to protect small utilities during the limited periods of spill.

utilities has increased by approximately one cent per kilowatt hour as a result of the BPA's Formula Allocation scheme. See *supra* p. 7. Accordingly, in 1985 alone, this scheme caused California consumers to pay an estimated $115 million to Northwest non-federal utilities for the approximately 11.5 billion kilowatt hours California utilities purchased from those non-federal sellers. Although the amount of electricity sold to California will vary from year to year depending upon Northwest rainfall and water flows, petitioners believe that this estimate demonstrates that over the indefinite life of the Intertie Policy, BPA's cartel will likely cost California consumers billions of dollars in increased energy bills.

* * * * *

Congress has recognized only two exceptions — for federal and Canadian Treaty energy — to the requirement that BPA allocate the capacity of the Intertie on a fair and nondiscriminatory basis. The Long Term Policy creates an additional exception that conflicts with the plain language of BPA's governing statute. Even if the statute were not so clear, the undisputed anticompetitive consequences of the Policy's allocation, and BPA's own economic self-interest, must have some bearing on how the statutes are to be interpreted and applied. Yet the Ninth Circuit has disregarded both the BPA's financial interest as well as the plain language of the statute and well-established principles governing the use of legislative history.

The economic consequences of these errors amount to billions of dollars. The issue is simply too important to leave exclusively to the Ninth Circuit.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

February 4, 1991

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United States

OCTOBER TERM, 1990

CALIFORNIA ENERGY COMMISSION;
CALIFORNIA PUBLIC UTILITIES COMMISSION;
DEPARTMENT OF WATER AND POWER OF THE
CITY OF LOS ANGELES;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF BURBANK;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF GLENDALE;
WATER & POWER DEPARTMENT OF THE CITY OF PASADENA;
PACIFIC GAS AND ELECTRIC COMPANY;
SOUTHERN CALIFORNIA EDISON COMPANY;
and SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioners,

vs.

BONNEVILLE POWER ADMINISTRATION;
JAMES J. JURA, as Administrator;
JAMES WATKINS, as Secretary of the
Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

February 4, 1991

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APPENDIX A

APPENDIX A

CALIFORNIA ENERGY COMMISSION,
Petitioner,

PUGET SOUND POWER & LIGHT COMPANY,
WASHINGTON WATER POWER COMPANY ("WWP"),
Petitioner-Intervenor,

v.

BONNEVILLE POWER ADMINISTRATION;
U.S. Department of Energy,
Respondents,

ASSOCIATION OF PUBLIC AGENCY CUSTOMERS; PUBLIC POWER COUNCIL; PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON; PACIFICORP, DBA PACIFIC POWER & LIGHT COMPANY ("PACIFIC"); PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON; WESTERN PUBLIC AGENCIES GROUP ("WPAG"); MONTANA POWER COMPANY; CITY OF SEATTLE, CITY LIGHT DEPARTMENT ("CITY"); PUBLIC GENERATING POOL ("PGP"); EUGENE WATER & ELECTRIC BOARD ("EWEB"); DIRECTOR SERVICE INDUSTRIAL CUSTOMERS ("DSIS"),
Respondent-Intervenor,

PACIFIC NORTHWEST GENERATING
COMPANY ("PNGC"),
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION;
U.S. DEPARTMENT OF ENERGY,
UNITED STATES OF AMERICA,
Respondents,

VANALCO INC.; ALUMINUM COMPANY OF AMERICA; COLUMBIA FALLS ALUMINUM COMPANY,
Petitioners,

WASHINGTON WATER POWER COMPANY ("WWP"); PUGET SOUND POWER AND LIGHT COMPANY,
Petitioner-Intervenor,

v.

BONNEVILLE POWER ADMINISTRATION;
Respondent,

PORTLAND GENERAL ELECTRIC COMPANY; ASSOCIATION OF PUBLIC AGENCY CUSTOMERS; ARCO; MONTANA POWER COMPANY; PUBLIC GENERATING POOL ("PGP"); EUGENE WATER & ELECTRIC BOARD ("EWEB"); NON-GENERATING PUBLIC UTILITIES ("NGPU"),
Respondent-Intervenor,

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,

PUGET SOUND POWER AND LIGHT COMPANY; THE DEPARTMENT OF WATER & POWER OF THE CITY OF LOS ANGELES; PUBLIC SERVICE DEPARTMENT OF THE CITY OF BURBANK; PUBLIC SERVICE DEPARTMENT OF THE CITY OF GLENDALE; WATER & POWER DEPARTMENT OF THE CITY OF PASADENA; SAN DIEGO GAS & ELECTRIC COMPANY AND SOUTHERN CALIFORNIA EDISON COMPANY; PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner-Intervenor,

v.

BONNEVILLE POWER ADMINISTRATION;
U.S. Department of Energy,
Respondents,

PACIFIC POWER & LIGHT COMPANY; EUGENE WATER & ELECTRIC BOARD ("EWEB"); PUBLIC GENERATING POOL ("PGP"); NORTHWEST POWER PLANNING COUNCIL; DIRECT SERVICE INDUSTRIAL CUSTOMERS ("DSIS"),

Respondent-Intervenor.

Nos. 88-7280, 88-7315, 88-7318 and 88-7319.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 5, 1990.

Decided July 26, 1990.

Petition to Review Bonneville Power Administration Agency Action.

Before CANBY, and LEAVY, Circuit Judges, and ORRICK, District Judge.*

CANBY, Circuit Judge:

This case involves consolidated challenges to the Bonneville Power Administration's ("BPA") Long-Term Intertie Access Policy ("LTIAP") which allocates access to the Pacific Northwest-Pacific Southwest Intertie, a system of high voltage lines transmitting federal and non-federal power between the two regions. The LTIAP is being attacked on several fronts by parties with diverse and sometimes competing interests. None of the parties with an interest in access to the Intertie is completely satisfied with the policy. Upon the whole record, however, we conclude that the LTIAP reasonably balances the

*The Honorable William H. Orrick, Senior United States District Judge, for the Northern District of California, sitting by designation.

interests of the affected parties in a manner consistent with the directives of Congress.

BACKGROUND

A. BPA and the Intertie

BPA is a federal agency within the Department of Energy that produces and markets power produced from dams that comprise the Federal Columbia River Power System. BPA also oversees access to the Intertie. The Intertie, completed in 1968, was designed to even out the peaks and troughs in the production and consumption of power in the Northwest and Southwest. During most of the year the Northwest produces more electricity than it can use and the Southwest experiences particularly heavy consumption. Less frequently, this pattern is reversed with the Northwest experiencing heavy demand and the Southwest able to produce surplus power. The Intertie allows the regions to assist each other during times of heavy demand.

That portion of the Intertie extending north of Oregon's border with California and Nevada is owned by BPA, Portland General Electric, and Pacific Power & Light, with BPA owning approximately 80% of the capacity. The southern end of the Intertie is owned by a group of California utilities, with PG & E, Southern California Edison, the Los Angeles Department of Water and Power, and San Diego Gas & Electric owning approximately 80% of the capacity.

B. Governing Statutory Authority

The primary authority, obligations and restrictions which govern BPA's operation of the Intertie are found in four statutes: the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839-839h.

("Northwest Power Act"); the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. §§ 838-838k. ("Transmission Act"); the Pacific Northwest Consumer Power Preference Act of 1964, 16 U.S.C. §§ 837-837h. ("Preference Act"); and the Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832l. ("Project Act").

The Northwest Power Act requires BPA, in marketing federal power, to establish rates that will produce sufficient revenues to ensure BPA's fiscal independence and repay the U.S. Treasury for the federal funds that were borrowed to build the projects in the Federal Columbia River Power System. 16 U.S.C. §§ 838g and 839e(a)(1). At the same time, Congress requires that PBA market federal power "with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles. . . ." 16 U.S.C. §§ 838g; *see also* 839e(a)(1). Under the Preference Act, BPA must give priority to public bodies, 16 U.S.C. § 832c(a), and to purchasers within the Northwest, 16 U.S.C. § 837a. Sales to purchasers outside of the Northwest are limited to energy "which would otherwise be wasted because of the lack of a market therefor in the Pacific Northwest at any established rate." 16 U.S.C. § 837(c); *see also* §§ 837(d) and 837a.

In allocating limited transmission capacity, BPA must give itself priority. 16 U.S.C. § 837e. Nevertheless, it must transmit non-federal power to the extent that the Federal transmission lines have capacity not needed to transmit federal power. *Id.* Congress directed BPA to reserve sufficient Intertie capacity to meet "current" and "foreseeable" federal needs. *Department of Water and Power of Los Angeles v. Bonneville Power Administration,* 759 F.2d 684, 692 (9th Cir.1985) ("*LADWP*"). That excess capac-

ity is to be made available to non-federal utilities "on a fair and nondiscriminatory basis." 16 U.S.C. § 838d.

The authority to transmit non-federal power is limited in two additional ways. First, the transmission must not be in conflict with BPA's other marketing obligations, applicable operating limitations or existing contractual obligations. 16 U.S.C. § 839f(i)(3). Second, any such transmission must be "[a]t the request and expense of any customer or group of customers" that sell power by transmitting it on the Intertie. 16 U.S.C. § 839f(i)(1).

In addition to these somewhat conflicting responsibilities to maintain low rates, repay the federal treasury, and provide transmission access for other utilities, BPA must also "protect, mitigate, and enhance fish and wildlife" affected by the operation of the federal hydroelectric system. 16 U.S.C. § 839b(h)(10).

C. The Long-Term Intertie Access Policy

The LTIAP is a result of BPA's attempt to balance the mandates of its governing statutes. The long-term policy had its roots in two temporary allocation policies — the Interim Intertie Access Policy and the Near Term Intertie Access Policy ("NTIAP"). We found those policies to be within BPA's statutory authority and consistent with the relevant statutes. *See LADWP,* 759 F.2d at 695; *California Energy Resources Conservation and Development Commission v. Bonneville Power Administration,* 831 F.2d 1467, 1469 (9th Cir.1987), *cert. denied,* 488 U.S. 818, 109 S.Ct. 58, 102 L.Ed.2d (1988) ("*CEC*"). In 1985 and 1986, BPA held public meetings on long-term Intertie access policy issues which culminated in the release of a proposed LTIAP in October, 1986. After receiving public comment, BPA issued a revised LTIAP in December, 1987. In May, 1988, after further public comment, BPA

adopted the final LTIAP. The policy provides non-federal utilities with Intertie capacity on two bases: Formula Allocation and Assured Delivery.

1. *Formula Allocation*

Formula Allocation is the policy which apportions Intertie capacity in excess of that required for firm power transactions. This policy allows non-federal utilities to make short-term spot sales of surplus power. The allocation system varies depending on which of three conditions exists. Condition 1 exists when there is a likelihood of spill[1] in the Northwest hydro system. Under Condition 1, BPA and each scheduling utility are allocated a pro rata share of the available Intertie capacity based on their declarations of surplus energy.[2] Whenever BPA is unable to make sales equal to its pro rata share, BPA takes larger allocations on subsequent days until it is able to sell its full pro rata market share.[3]

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[1]"Spill" exists when Northwest dams are overflowing and hydroelectric energy must either be generated immediately for sale outside the Northwest or the water's electric generative potential will be wasted.

[2]Utilities are discouraged from overstating their surplus energy by a "take-or-pay" rule which requires the utilities to pay the cost of transmitting their stated surplus whether or not the entire amount of the stated surplus is actually transmitted.

[3]This ability to expand allocation to assure a pro rata share of the sales is known as the "true up." BPA must offer power to the Northwest before it can sell power to California. This allows competitors to learn BPA's price and enables them to undercut that price. Often, this situation prevents BPA from making sales. The true up attempts to reduce the amount of sales lost by BPA as a result of these circumstances.

Condition 2 occurs when there is no likelihood of spill in the power system but BPA and the Northwest utilities have more than enough surplus nonfirm energy to fill the Intertie. Under Condition 2, BPA and each scheduling utility again receive a pro rata share of the available capacity based on their declared surplus. If BPA's sales drop below 75% of its allocation, BPA may take larger allocations on ensuing days until the difference is eliminated.

Finally, under Condition 3, which becomes operative only when BPA and the Northwest utilities lack sufficient surplus to fill the Intertie, extraregional utilities may gain access to the Intertie.

In response to the concerns of California utilities and to test the alternatives we proposed in *CEC*, BPA is conducting an 18-month experiment[4] that applies during Conditions 2 and 3. Under the experiment, BPA receives its allocation first and the remaining Intertie capacity is made available to Northwest utilities on a competitive basis.

2. *Assured Delivery*

The Assured Delivery provisions of the LTIAP allocate transmission capacity to non-federal sellers on a continuous, long-term basis allowing these non-federal utilities to make firm power sales and power exchange transactions. The LTIAP provides 800 megawatts ("MW") of Assured Delivery to non-federal utilities — up to 444 MW for long-term firm export sales, an amount equal to the

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[4]This experiment was to end in March 1990. Due to a lack of data, however, the Administrator has extended the experiment an additional 18 months, to conclude in September 1991.

Northwest utilities' existing average firm surplus, and the remainder for exchange transactions.

By granting Assured Delivery to non-federal utilities, BPA precludes itself from using that capacity for its own sales, resulting in an estimated revenue loss to BPA of a discounted net present value of $200 million over the period 1989-2006.[5] BPA imposed "operational mitigation" requirements to help offset this loss. First, the LTIAP requires that, for southbound deliveries, each utility requesting service during Conditions 1 or 2 must deduct its Assured Delivery from its Formula Allocation. To the extent that its Assured Delivery exceeds its Formula Allocation, the utility must purchase the difference (a) from BPA or a Scheduling Utility with a formula allocation during Condition 1, or (b) during Condition 2 from BPA, unless BPA is not then "in the market," in which case from any other utility with an allocation. For northbound energy returns, Northwest utilities electing to use "cash-out" provisions will have their available Intertie capacity reduced by the amount of the cash-out.[6] This arrangement is intended to preserve the economy energy market for all Northwest utilities. Alternatively, mitigation may be negotiated on a case-by-case basis.

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[5]BPA could avoid this loss by forcing the firm supplier to purchase surplus BPA power at BPA's rates when capacity is not otherwise available and send it along the Intertie as part of the supplier's firm contract. For reasons that will be discussed below, BPA rejected this alternative.

[6]A "cash-out" provision in an exchange contract allows the Southwest utility to purchase, in effect, the energy at nonfirm prices in lieu of actually returning it to the Northwest utility.

3. *Fish and Wildlife Protection*

To effectuate BPA's responsibilities to protect fish and wildlife, the LTIAP provides that a utility obtaining power from or constructing a hydroelectric plant located in a designated Protected Area will lose a portion of its formula allocation equal to the amount of power so acquired. New hydroelectric projects constructed in protected areas will be denied access to the Intertie unless they demonstrate that they will benefit BPA's fish and wildlife efforts.

Several parties now raise various challenges to the LTIAP. The parties include petitioners California Energy Commission ("CEC"), Pacific Gas & Electric Company ("PG & E"), the California Public Utilities Commission ("CPUC"), the Southern California Utilities, and Direct Service Industrial Customers ("DSI"), and intervenors Western Public Agencies Group ("WPAG"), Puget Sound Power & Light Company ("PSP"), the Northwest Power Planning Council ("NPPC"), and the Public Generating Pool ("PGP").

JURISDICTION

[1] We have original jurisdiction to review final actions and decisions of the BPA taken pursuant to any of the BPA's four enabling statutes. 16 U.S.C. § 839f(e)(5); *LADWP,* 759 F.2d at 685 n. 1. CPUC contends, however, that BPA's adoption of the LTIAP constitutes ratemaking and thus requires approval by the Federal Energy Regulatory Commission (FERC) before judicial review is available. *See* 16 U.S.C. §§ 839e(i)(6) and 839e(k). We reject this contention.

CPUC first argues that the LTIAP, by allocating the capacity of the Intertie to BPA and Northwest utilities on the basis of fixed, proportionate shares, effectively elimi-

nates competition and allows BPA to charge higher rates in its transactions with California. It asserts that this process constitutes ratemaking. In *CEC* we ruled that virtually identical provisions in the NTIAP did not constitute ratemaking.[7] *CEC,* 831 F.2d at 1471-74. That holding compels a similar conclusion here.

CPUC also argues that the LTIAP's mitigation provisions constitute ratemaking. These provisions were not part of the NTIAP. Therefore, we did not address this issue in *CEC.*[8] CPUC notes that the LTIAP allows utilities the option of negotiating mitigation measures on a case-by-case basis, LTIAP § 4(d)(2), and that such mea-

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[7] FERC also ruled that the NTIAP was not ratemaking subject to its approval. 33 FERC (CCH) ¶ 61,235, at p. 61,486 (Dec. 12, 1985.)

[8] Though *CEC* is not controlling on the question of whether the mitigation provisions constitute ratemaking, its reasoning is instructive. As with the provisions of the NTIAP found not to constitute ratemaking, the mitigation provisions do not "impose any charge at all or define any formula for computing charges." *CEC,* 831 F.2d at 1472. They do not "give BPA authority to increase or decrease its own established charges for energy." *Id.* Nor are these measures "a statement describing rates and charges for service." *Id.* at 1473, (citing 18 C.F.R. § 300.1(7); 10 C.F.R. § 903.2(n)). Moreover, these measures do not conflict with any existing rate schedule, *Id.* at 1473.

CPUC relies on *Portland General Electric Co. v. Johnson,* 754 F.2d 1475 (9th Cir.1985) in which the court found a mitigation formula to be a change in the availability provision of BPA's NF-2 rate schedule for economy energy. In *CEC* we distinguished *Portland General* stating:

> Unlike the action in [*Portland General*], the BPA action challenged here does not conflict with the agency's existing rate schedules. The Access Policy is a formal statement of BPA's Intertie allocation policies. It does not make BPA energy available to purchasers at charges authorized for other purchasers or in any way attempt to avoid established rates.

CEC, 831 F.2d at 1473. The same is true here.

sures could include establishing a rate. But if it does, that rate would be subject to the procedural requirements of Section 7(i) of the Northwest Power Act, 16 U.S.C. § 839e(i). That fact does not turn the preceding negotiations into ratemaking. The LTIAP may have some ultimate effect on rates, but the mere fact that an agency action has an indirect effect on revenues does not mean that the action constitutes ratemaking. *See CEC*, 831 F 2d at 1473.

STANDARD OF REVIEW

[2] We must affirm BPA's action unless it is arbitrary, capricious, an abuse of discretion, or in excess of statutory authority. 16 U.S.C. § 839f(e)(2); 5 U.S.C. § 706; *CEC,* 831 F.2d at 1472. This standard of review is deferential and presumes the agency action to be valid. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). Because BPA drafted the Northwest Power Act, its interpretation of the Act is to be given "great weight" and should be upheld if reasonable. *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.,* 467 U.S. 380, 389-90, 104 S.Ct. 2472, 2479-80, 81 L.Ed.2d 301 (1984) (ALCOA I); *Aluminum Co. of America v. Bonneville Power Administration,* 891 F.2d 748, 752 (9th Cir.1989) (ALCOA II). Nevertheless, we are required to reject the BPA's constructions of a statute that are inconsistent with the statutes or that frustrate the policy Congress sought to implement. *Southern Cal. Edison Co. v. FERC,* 770 F.2d 779, 782 (9th Cir.1985). While we may not substitute our judgment for that of the Administrator, our factual inquiry is to be "'searching and careful.'" *LADWP,* 759 F.2d at 691 (quoting *Citizens to Preserve Overton Park,* 401 U.S. at 416, 91 S.Ct. at 824).

Petitioners suggest, however, that BPA should be afforded less deference here because it has an economic interest in obtaining a larger share of the economic benefits of the interregional transactions. In support, they cite *National Fuel Gas Supply Corp. v. FERC,* 811 F.2d 1563, 1571 (D.C. Cir.), *cert. denied,* 484 U.S. 869, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987) ("if the agency itself were an interested party . . . deference might lead a court to endorse self-serving views that an agency might offer. . . ."). We disagree. As we will explain below, BPA did not draft the LTIAP to maximize its revenues. Moreover, we have rejected the argument that BPA is entitled to no deference in ratemaking decisions, even where it has an interest in the outcome. *ALCOA II,* 891 F.2d at 757 n. 12. There is no reason for a different result here.

ANALYSIS

A. Justiciability of the Direct Service Industrial Customers' Claims

1. *Standing*

[3] The Direct Service Industrial Customers (DSI) and the Western Public Agencies Group (WPAG) argue that their rates under the LTIAP will be higher than allowed by statute. BPA responds that any harm to DSI and WPAG resulting from a future rate increase caused by the LTIAP is merely speculative and, having suffered no direct injury by BPA's adoption of the LTIAP, DSI and WPAG have no standing to challenge the policy. To have standing petitioners must show 1) that the challenged action caused them injury in fact, 2) that the injury was within the zone of interests to be protected by the statutes that were allegedly violated, and 3) that the relief sought would cure the injury. *ALCOA II,* 891 F.2d at 752. DSI and WPAG satisfy these requirements.

Contrary to BPA's claim, DSI and WPAG do not suggest that they will be injured by a possible rate hike. Rather, they claim that their current rates under the LTIAP are higher than they would be if the LTIAP complied with the statutory requirement that BPA's customers be charged the lowest rate possible. 16 U.S.C. § 838g. BPA has estimated that by providing Assured Delivery to non-federal utilities under the LTIAP it will bring in $764 million less over a 20-year period than it would if it adopted a policy whereby it exhausted its surplus before allowing non-federal utilities access to the Intertie (a "federal-first" policy). LTIAP Administrator's Decision (Ad.Dec.) at 170. This "cost" must be borne by either the total requirements ratepayers or the Treasury. DSI argues that since the Treasury is being repaid on time, the ratepayers are bearing the burden. "There is harm in paying rates that may be excessive. . . ." *ALCOA II* at 753. Thus, DSI and WPAG have alleged an immediate economic injury. That the injury is to their members does not deprive the organizations of standing. *See Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

DSI and WPAG have alleged a violation of 16 U.S.C. §§ 838g and 839e(a)(1), which direct BPA to establish rate policies encouraging "the lowest possible rates to consumers." As consumers of BPA power, DSI and WPAG are within the zone of interest protected by the statute.

Finally, the alleged injury could be remedied by our directing BPA to adopt an allocation policy which seizes more of the Intertie for potential federal spot market sales or imposes higher costs for non-federal use. Although we do not direct BPA to adopt such measures, the fact that this relief is sought and that we have the power

to give it satisfies the third requirement for standing. DSI and WPAG have standing to challenge the LTIAP.

2. *Reviewability*

[4] BPA further argues that the statutory directive that BPA sell power at "the lowest possible rates . . . consistent with sound business principles" is a matter committed to the Administrator's discretion and thus is not reviewable. Generally, final agency actions are reviewable. "[N]onreviewability [is] a narrow exception, the existence of which must be clearly demonstrated." *City of Santa Clara v. Andrus,* 572 F.2d 660, 666 (9th Cir.) *cert. denied,* 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978). A matter is committed to agency discretion by law only when the statutory terms are so broad that there is "no standard against which [the court can] measure the lawfulness of the agency action." *Id.* The test is not applied in the abstract, but is "whether '*in a given case*' there is no law to be applied." *Id.* (quoting *Strickland v. Morton,* 519 F.2d 467, 470 (9th Cir.1975)) (emphasis in original).

BPA cites three cases for the proposition that there is no law for this court to apply in this action: *City of Santa Clara v. Andrus,* 572 F.2d 660 (9th Cir.), *cert. denied,* 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978); *Pacific Power and Light Co. v. Duncan,* 499 F.Supp. 672 (D.Or.1980); and *Montana Power Co. v. Edwards,* 531 F.Supp. 8 (D.Or.1981). Each of these cases found that the standards there at issue did not provide applicable law. Nevertheless, the cases are not controlling here. *City of Santa Clara* does not apply here because it involved a different standard. The other cases involved the same standard, but in a different context. Both *Pacific Power & Light* and *Montana Power Co.* addressed the reviewability

of the "lowest possible rates" provision of 16 U.S.C. § 838g and found there was no law to apply to a challenge to BPA's rate design decision. Rate design is a method of allocating costs *among* BPA's customers. Thus, the court correctly decided that the "lowest possible rates" standard would provide no law for resolving a dispute among purchasers of federal power. In this case, however, the petitioners' claim is directed at the impact on BPA's energy customers of its decision to provide Intertie access to non-federal utilities for the purpose of permitting those utilities to sell non-federal firm energy. In other words, DSI and WPAG claim that the LTIAP causes BPA to waste federal energy and to recover the lost revenues through higher rates for the federal energy BPA sells to DSI, WPAG and others. Here, the "lowest possible rates" standard provides applicable law. *Cf. ALCOA II* at 761.

B. DSI's Challenges to the LTIAP

1. *DSI's Statutory Claims*

[5] We turn now to the merits of DSI's and WPAG's claim that the LTIAP is inconsistent with BPA's governing statutes because it does not fully satisfy federal needs for Intertie capacity before providing access to non-federal utilities, it fails to maximize BPA returns and it fails to recover from Northwest utilities all the revenue BPA forgoes by allowing these utilities access to the Intertie. We reject these contentions.

"In allocating Intertie capacity among itself and other Northwest electricity producers, BPA is statutorily required to give itself preference. 16 U.S.C. § 837e." *LADWP*, 759 F.2d at 687. BPA may make the federal Intertie available to non-federal utilities if: 1) its assistance is at the expense of those entities whose power is transmitted, 16 U.S.C. § 839f(i)(1); 2) the transmissions

are "not in conflict with [BPA's] other marketing obligations," 16 U.S.C. § 839f(i)(1)(B); and 3) the transmission does not cause a "substantial interference with [BPA's] power marketing program." 16 U.S.C. § 839f(i)(3). BPA's statutory marketing obligations include 1) collecting sufficient revenues on sales of federal power to recover its costs and repay the Treasury, while 2) fixing rates "with a view toward encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles." 16 U.S.C. §§ 838g and 839e(a)(1).

In developing the LTIAP, BPA balanced three interests: the desires of the Northwest generators to sell or exchange power on a firm basis to California; the desires of BPA's total requirements customers for stable and favorable rates; and BPA's obligation to repay the U.S. Treasury. DSI and WPAG argue that only the duties to repay the Treasury and to charge consumers the lowest possible rates are statutorily mandated and that by considering the welfare of Northwest utilities, BPA elevated a non-statutory policy consideration to the level of BPA's statutory marketing obligations. DSI suggests this approach was error because BPA ignored the priorities Congress decreed.

Although DSI's and WPAG's interpretation of the statutes is plausible, that fact does not require us to overturn the LTIAP. "This court need not find that the BPA interpretation of the four statues 'is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' We need only conclude that it is a reasonable interpretation." *LADWP,* 759 F.2d at 693 (quoting *ALCOA I,* 467 U.S. at 389, 104 S.Ct. at 2479).

The statutes cited above afford BPA a measure of discretion which it has exercised reasonably.

First, BPA gives itself preference on the Intertie, though not in the manner DSI suggests it should. BPA reserves sufficient capacity to satisfy its firm sales. Moreover, with the true up mechanism, BPA ensures that it has access to the Intertie for its spot sale needs. Thus, the LTIAP gives BPA sufficient access to carry the energy it produces while recognizing that the Intertie was envisioned in part as a resource available to non-federal utilities.

Also, the statutes do not dictate that BPA always charge the lowest possible rates. 16 U.S.C. § 838g directs that rates be set "with a view to encouraging . . . the lowest possible rates to consumers. . . ." The words "with a view to encouraging" do not constitute a statutory command that the prices charged to consumers always be the lowest possible. Moreover, nearly every action by BPA has some arguable impact on future rates. If the strict interpretation of the "lowest possible rates" standard advanced by DSI were accepted, the discretion that Congress vested in the Administator would be eliminated.

In addition, the direction to charge the lowest possible rates is tempered by the addition of the clause "consistent with sound business principles." 16 U.S.C. § 838g. The federal-first policy espoused by DSI would preclude some Northwest non-federal generating utilities from gaining access to the Intertie. This exclusion would force those utilities to sell their energy in the Northwest, displacing BPA power sales. BPA reasonably concluded that a federal-first policy is not consistent with sound business principles.

Finally, unlike DSI, we read § 839f(i)(1)(B) to require a customer to compensate BPA only for the expense of the actual transmission, not for revenues BPA forgoes by not using the capacity itself. Consequently, BPA is not undercharging the Northwest utilities to transmit their power as DSI suggests.

2. *DSI's Procedural Claims*

[6] DSI further argues that BPA's adoption of the LTIAP was arbitrary and capricious in three ways: 1) BPA failed to explain why, when the LTIAP produced net benefits, the interests of BPA's customers and non-federal utilities could not be balanced to benefit the non-federal utilities without imposing additional costs on BPA's customers; 2) BPA did not explain its failure to require any compensation from transmitting utilities for forgone returns resulting from Formula Allocation; and 3) BPA based its determination of the amount of Assured Delivery it would provide and the amount of mitigation for Assured Delivery on inconsistent assumptions of Intertie capacity. Although BPA may not have addressed these specific questions directly, our review of the Administrative Decision reveals that BPA gave sufficient reasons for its decisions to satisfy the arbitrary and capricious standard.

BPA addressed the concerns of its total requirements customers directly, and adequately explained its reasons for not adopting the federal-first policy promoted by DSI. Ad.Dec. at 26-27. BPA reasonably concluded that the economic impacts of the non-federal Assured Delivery provisions, given mitigation requirements, were acceptable, *id.* at 92, while providing significant interregional benefits, *id.* at 18, 26, 91, as well as benefits to BPA, *id.* at 26-27. BPA also described how its distribution policy

under Formula Allocation protected its ability to generate revenue and maintain low rates. *Id.* at 27. Moreover, BPA recognized its responsibility to avoid imposing on its Northwest customers the burden of revenues lost as a result of its policies and stated that if the revenue-protective measures adopted in the LTIAP proved unworkable, it would turn to a federal-first policy to maintain rate stability. *Id.* at 28.

Finally, DSI suggests that BPA assumed the availability of a third AC line in the Intertie in calculating the amount of mitigation for Assured Delivery but did not consider that increased capacity in determining the amount of Assured Delivery. Consequently, DSI claims, if the third line is not completed, the savings due to the mitigation provisions will be insufficient to cover BPA's forgone revenues. Although one of the studies upon which BPA relied did assume the availability of the third line, BPA also relied on a study by the Pacific Northwest Utilities Conference Committee (PNUCC) that did not assume the third line. Thus, BPA's decision was based upon estimates under the current Intertie capacity as well as under the proposed increased capacity of the Intertie in 1991.

C. *The Formula Allocation Provisions*

[7] The California petitioners argue that BPA abused its discretion by adopting the Formula Allocation provisions because they are "anticompetitive" and BPA's stated objectives could be achieved by more competitive alternatives. Before addressing these arguments, we note that, although the antitrust laws do not apply to BPA,[9] BPA must consider some federal antitrust policies when allocating Intertie capacity. *CEC,* 831 F.2d at 1475; *see*

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[9] *LADWP,* 759 F.2d at 693 n. 12.

also Gulf States Utilities Co. v. FPC, 411 U.S. 747, 757-60, 93 S.Ct. 1870, 1877-79, 36 L.Ed.2d 635 (1973); *City of Huntingburg v. FPC,* 498 F.2d 778, 783 (D.C.Cir.1974); *but cf. Pension Benefit Guaranty Corp v. LTV Corp.,* ____ U.S., ____, ____, 110 S.Ct. 2668, 2674-78, 110 L.Ed.2d 579 (1990) (Pension Benefit Guaranty Corp. not required to take explicit account of policies of bankruptcy or labor laws when rendering decision under ERISA). Nevertheless, if this responsibility to consider antitrust policies conflicts with BPA's obligation to be fiscally self-supporting, the responsibility to the Treasury takes precedence. 831 F.2d at 1475. In other words, BPA may allocate Intertie capacity on a pro rata basis to satisfy the demands of its governing statutes.

[8] The California petitioners first contend that BPA has failed even to consider its responsibility to promote antitrust policies. They are wrong. BPA has given adequate consideration to the effect of the LTIAP on competition in the interregional energy markets. The most extensive section of the Administrator's Decision discusses the issues and concerns raised by the California petitioners here. Ad.Dec. at 48-71. In addition, before releasing the final LTIAP, BPA commissioned the Sullivan Report to assess the effect of the proposed policy on competition. Now, BPA is conducting an experiment to observe the effects of allowing competition among nonfederal utilities for access to the Intertie during Conditions 2 and 3.[10] Clearly, BPA did give the anticompetitive effect of its policy significant consideration. This conclusion does not end the inquiry, however. We must now address whether BPA's policy is reasonable.

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[10]Although this experiment is further evidence of BPA's attention to concerns of competitiveness, it is not a permanent part of the LTIAP and we do not consider it in our review of the access policy.

[9] Petitioners argue that Formula Allocation is not necessary to assure BPA's financial stability. Formula Allocation allows the Northwest non-federal sellers to charge more for their nonfirm energy than they could if they were competing with each other. BPA asserts that federal revenues would be adversely affected by competition among the non-federal sellers because lower energy prices paid to those sellers would result in 1) decreased purchases by some of those utilities of BPA's firm power, and 2) increased "residential exhange" payments by BPA to some of these utilities.[11] BPA has estimated these impacts at approximately $10 million a year in lost firm sales and $6 million a year in increased residential exchange costs under a worst-case scenario. Ad.Dec. at 50-51.

These estimated costs of allowing competition for access appear to be overstated. In arriving at the $10 million estimate for lost firm power sales, BPA neglected to consider that it may be able to sell the displaced power to California on the spot market. Moreover, a majority of BPA's alleged residential exchange losses were to come from assumed increases in subsidy payments caused by lower PG & E and PP & L prices. The fixed shares of the Intertie of these utilities, however, are not subject to the

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[11]Under Section 5(c) of the Northwest Power Act, an electric utility in the Northwest may elect to sell power to BPA at the "average system cost of that utility's resources." 16 U.S.C. § 839c(c)(1). BPA then sells the same amount of power back to the utility at BPA's lower wholesale rate. This enables the utility to sell power to its residential customers at the priority rate given to residential customers receiving BPA federal power. Surplus energy revenues are used as a credit in calculating the utility's "average system cost" under the program. Thus, when Northwest utilities make less money on sales to California, BPA's residential exchange payments increase.

LTIAP. These utilities would suffer some losses from a general decline in prices, but those losses would be tempered by the fact that there is no competition for their shares of the Intertie. Nevertheless, although BPA's estimate is exaggerated, BPA could reasonably assume that a policy allocating nonfirm capacity on a competitive basis would have some negative impact on BPA's revenues.

BPA offers four other justifications for the pro rata allocations: 1) without the allocations, the ability of Northwest utilities to underbid BPA because of their statutory right to know BPA's prices would threaten lost BPA revenues and wasted federal energy; 2) the allocations provide BPA with a mechanism to enforce restrictions on new hydroelectric plants in Potected Areas; 3) the allocations maintain prices during a time when spill conditions would drive Northwest prices below the cost of providing spot market energy; and 4) Northwest utilities, particularly smaller ones, receive continued assurance of their ability to export power and avoid wasteful spill. Because we find the fourth justification adequate to support BPA's decision, we need not assess the validity of the first three.

BPA supports it fourth justification by arguing that the pro rata allocation scheme is necessary to preserve the export market for small non-federal utilities such as the PGP in order to avoid spill and protect its own revenues. BPA's consideration of these factors is not inconsistent with any congressional directive.[12] In fact, pro rata alloca-

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[12]Congress has never disapproved a policy allocating Intertie access on a pro rata basis despite being aware that BPA contemplated such a policy even before the Intertie was constructed. During early congressional hearings on the Intertie, Secretary of Interior Udall said, "It would be in the national interest and the interest of the electric consumers of both regions that all electric utilities partici-

pate fully in using such interconnections." Hearings before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 87th Cong., 2d Sess. 4 (1962). At those same hearings, former BPA Administrator Paul J. Raver also spoke in favor of the Intertie saying:

> It is also essential that the rights of the Northwest region as a whole be preserved directly. Likewise, it is necessary that no single utility or group of utilities, whether federally, municipally, or stockholder owned, be permitted to use the tie line or lines for the transmission of Federal power in such a manner as to control the destiny of any other utility or group of utilities. . . .
>
> This bill, in our opinion, will provide the regulatory guidelines needed to insure that any tie line or tie lines, regardless of ownership, will be operated with due consideration to the rights and responsibilities of all the utilities of the Northwest and will be in the national interest.

Id. at 75. Later, a Department of Interior Report informed Congress that:

> BPA ha[d] assured the public and private utilities of its service area access over Bonneville's lines to California, Nevada, and Arizona markets proportionate to the respective surpluses of the various utilities.
>
> Department of Interior Report to the Appropriations Committees of the Congress of the United States, Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest 34 (Comm.Print 1964).

Once construction of the Intertie was authorized, the Department of Interior presented copies of the Exportable Agreement — the original Intertie access policy — to Congress. The Exportable Agreement allocated the federal Intertie capacity on a pro rata basis. Congress never took any action to change this policy.

In outlining this history we do not mean to suggest that Congress has approved Formula Allocation. This history does indicate, however, that Congress has not prohibited such a policy and that it is within BPA's discretion to adopt a pro rata allocation scheme.

tion is consistent with the statutory requirement that excess capacity be made available to non-federal utilities "on a fair and nondiscriminatory basis." 16 U.S.C. § 838d. Therefore, it is within BPA's discretion to develop a policy to protect the access of small utilities to the Intertie. If access were available only on a competitive basis, the larger utilities would nearly always be in a position to underbid the small utilities. This denial of access would be devastating to these small utilities which would be faced with the prospect of having to spill during Condition 1. Their only alternative would be to use the power which would otherwise be spilled to displace power purchases from BPA. BPA could sell some of that displaced power on the spot market, but the rates it could charge for the spot sales would generally be lower than those for the contemplated firm sales and its revenues would suffer. As we have already pointed out, BPA may consider its revenues when formulating its access policy.[13]

Our task is not to determine whether the BPA policy is the best available, but whether BPA considered the proper factors and acted reasonably in light of its governing statutes. In developing the Formula Allocation provisions, BPA reasonably balanced the interests it is required to consider.[14]

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[13]BPA also justifies the pro rata allocation mechanism as a response to the monopsony power of California utilities over the southern portion of the Intertie. The parties dispute whether Formula Allocation may be upheld on this basis. Because evidence in the record of anticompetitive conduct among the California petitioners is inconclusive and resolution of this issue is not necessary for our decision, we decline to rule on the issue here.

[14]CEC also asserts that the Preference Act and the Transmission Act prohibit BPA from affording Northwest non-federal power priority over non-treaty Canadian power for access to Intertie transmis-

D. The Assured Delivery Provisions

The California petitioners and PSP challenge the Assured Delivery Provisions of the LTIAP, but on different grounds from those proposed by DSI and WPAG. These challenges take two forms: 1) that the Assured Delivery limitations are inconsistent with BPA's governing statutes; and 2) that the 800 MW limitation and mitigation provisions are arbitrary and capricious and not adequately supported in the Administrator's Decision.

1. *Compliance With the Governing Statutes*

[10] 16 U.S.C. § 837e requires that any Intertie capacity which is not required for the transmission of federal energy "shall be made available as a carrier for transmission of other electric energy." In addition, the Transmission Act requires BPA "to make available to all utilities on a fair and nondiscriminatory basis" excess capacity which is available in the transmission system. 16 U.S.C. § 838d. The legislative history of § 837e explains that

> In determining the existence of capacity excess to the needs of the Government, Federal needs reasonably forseeable may be included but the Secretary may not decline to enter into a wheeling agreement merely because he may have energy available for sale to serve the same load.

H.R.Rep. No. 590, 88th Cong., 2d Sess. (1963); 1964 U.S.Code Cong. & Ad.News at 3342, 3350. We interpret this statement to mean that

> BPA is permitted . . . to reserve sufficient Intertie capacity not only for its current needs but also for its

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sion. We expressly rejected this argument in *LADWP*. 759 F.2d at 693-94.

> "foreseeable" future needs, so long as the agency does not compete with other utilities on the mere speculation that it "may have energy available" sometime in the future to sell to the same customer.

LADWP, 759 F.2d at 692.

The LTIAP provides 800 MW of Intertie capacity — out of a total capacity of approximately 5200 MW owned by BPA — to Northwest utilities for Assured Delivery service. BPA has projected that it will have a maximum of approximately 2100 MW of firm power and exchange contracts with California. Petitioners argue, then, that 2100 MW is the maximum capacity BPA can foreseeably have available to sell to California, and therefore should be the maximum amount BPA can reserve on the Intertie. The remaining 3100 MW, they claim, should be available to non-federal utilities for firm transactions. This result is plausible under, but not compelled by, the statutes.

As long as the BPA is fair and nondiscriminatory, it has the discretion to allocate excess transmission capacity as it sees fit. *LADWP,* 759 F.2d at 693. There is no requirement in the governing statutes that BPA provide any access on a firm basis. In fact, in normal years, BPA's own surplus economy energy supply is sufficient to load the entire Intertie with federal energy 46% of the year. If BPA satisfied all of its needs before making capacity available to others, there would be no capacity available for year-round, non-federal, firm transactions. Thus, BPA could make all of the excess capacity on the Intertie available only on a non-firm basis or on a firm basis for only part of the year.[15] Instead, BPA has responded to

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[15]We recognize that utilities are able to use Intertie capacity more efficiently and profitably if allocated on a firm rather than a nonfirm basis. Nevertheless, this ability is but one of several factors BPA

the request of these non-federal utilities and provides capacity for some firm transactions.

Moreover, BPA is statutorily required to satisfy its own needs before providing access to other utilities and to furnish transmission only as long as it does not interfere with its power marketing program. 16 U.S.C. § 839f(i)(3). BPA's power marketing program includes its responsibility to recover its costs and to repay the Treasury. As we said in *LADWP:*

> [I]t is clear from the legislative history that Congress did not intend BPA to compete with other Northwest utilities for access to the Intertie. The theme of the [Preference] Act is that BPA, as owner and operator of the Intertie, should be allowed preference in transmission of its electricity over the Intertie as necessary to meet its statutory mandate of being self-financing.

LADWP, 759 F.2d at 692. By limiting Assured Delivery to 800 MW — the amount BPA concluded it could supply and still meet its repayment obligations — BPA complied with the mandate of § 839f(i)(3). Although § 837e and its legislative history lends itself to various interpretations, that of BPA is reasonable. We therefore defer to BPA's interpretation.

2. Whether the 800 MW Limit Is Arbitrary and Capricious

To establish that BPA acted arbitrarily and capriciously in setting the 800 MW limit on Assured Delivery, petitioners must demonstrate that BPA "has relied on factors which Congress has not intended it to consider,

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considers in formulating the access policy. As will be discussed below, the disadvantages of allocating more power on a firm basis outweigh the benefits of efficiency.

entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automotive Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983). Petitioners have failed to meet this standard. BPA offers three justifications for the 800 MW limit: revenue impacts; operational concerns; and environmental effects. The Administrator's Decision contains adequate support for these justifications.

a. Revenue Considerations

[11] In setting the limit on Assured Delivery, BPA considered its need to sell its own economy energy, the potential economic effects of Assured Delivery, and the benefits to BPA of providing opportunities to Northwest utilities to sell their surplus power to the Southwest. BPA based its decision on its own public assessment of the revenue impact of its Assured Delivery proposal and on a study by the PNUCC. BPA's study indicated that providing Assured Delivery would cause it to lose economy energy sales in the Southwest and priority firm sales in the Northwest due to seasonal exchanges in the winter. BPA estimated its losses at $9 million each year through 2006 even with the mitigation requirements. PNUCC estimated the losses at $3 million to $24 million per year.[16] Despite these losses, BPA determined for reasons

[16]CEC argues that BPA has not established that seasonal exchanges would reduce BPA revenues because neither BPA nor PNUCC accounted for the fact that if BPA failed to make sales of firm power in the winter, it could cover some of those losses by selling that energy on the spot market. These sales would increase BPA's pro rata share of the Intertie and its revenues from nonfirm energy

discussed previously that its Assured Delivery policy was superior to a federal-first policy.

Petitioners argue that increasing the limit on Assured Delivery would not threaten BPA's ability to market its surplus power, because BPA could force the firm suppliers to buy BPA's surplus power at BPA's prices and send it along the Intertie as part of the suppliers' firm contract sales. This argument fails to consider the impact on BPA's revenues of the market for non-federal surplus economy energy. Many Northwest utilities depend on economy energy exports during high water months for a significant portion of their revenues. If all excess capacity on the Intertie were filled under firm contracts, these utilities could not export their surplus economy energy. This inability would cause these utilities either to spill or to displace their normal purchases from BPA with their own surplus power, resulting in lost revenue to BPA from reduced sales and greater costs under the residential exchange program established by the Northwest Power Act. 16 U.S.C. § 839c(c). Again, BPA is entitled to take into account its own revenue requirements when it allocates time on the Intertie. The 800 MW Assured Delivery limitation adequately balances the interests of the utilities in having Intertie capacity available for firm transac-

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sales in the winter. Consequently, CEC contends, both BPA's and PNUCC's estimates of revenue losses were substantially overstated. On the other hand, BPA noted that its estimate was based on assumptions which may change, causing greater losses. Moreover, after BPA grants contractual rights to Assured Delivery, it cannot retrieve that Intertie capacity to minimize the effects of changed conditions until the contract terminates. Under LTIAP § 1.4, these contracts can last up to 20 years. Thus, BPA's conservatism in granting Assured Delivery is justified by its prudent reluctance to decrease greatly its flexibility to respond to the uncertainties of the future.

tions and BPA's interest in minimizing its losses incurred in allowing firm transactions.[17]

b. Operational Considerations

[12] In establishing the 800 MW limit on Assured Delivery, BPA considered the ability of Northwest utilities to generate firm surplus power, the limitations on power generation during the summer, and the stated needs of utilities in both regions for exchange transactions. First, BPA relied on an annual PNUCC report which observed that non-federal firm surplus in the Northwest has never exceeded 420 MW. Moreover, BPA expects regional firm surplus supplies to decline in the future due to increased demand in the Northwest. Thus, BPA's allocation of 444 MW for firm sales closely tracks available supply and is reasonable.

Furthermore, August is a high demand month in the Southwest, but a low water month in the Northwest and a time when some reservoirs retain water for recreational needs. The 800 MW limit was the BPA estimate of the amount of Northwest non-federal generation prudently available for export during August. In addition, BPA met with the utilities and concluded that there was no need

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[17]CEC also questions BPA's authority to impose the mitigation requirements. 16 U.S.C. § 832a(b) authorizes the Administrator to operate Bonneville project transmission lines "as he finds necessary, desirable, or appropriate" to transmit energy. This delegation of authority is broad, allowing the Administrator substantial discretion. This discretion is tempered only by the implied limitation that the Administrator's action not be inconsistent with other congressional decrees. The mitigation provisions offend no statute. Therefore, it was within the Administrator's authority to adopt these provisions.

for a near-term Assured Delivery greater than 800 MW.[18] There is a reasoned basis in operational considerations for the 800 MW limit.[19]

This rationale, however, although alluded to, is not explicit in the Administrator's Decision. The Supreme Court has stated that an agency must "articulate a satisfactory explanation for its action. . . ." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 103 S.Ct. at 2866. Nevertheless, the Court also said that it will " 'uphold a decision of less than ideal clarity if the agency's path may reasonably be

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[18] In its reply brief, CEC alleges that BPA ignored the fact that utilities had expressed a need for seasonal exchanges in excess of 800 MW. PG & E alone, for example, had one signed contract and two letters of intent for three seasonal exchanges with Northwest utilities that would require 650 MW of Assured Delivery. These exchanges were to begin within three years of the issuance of the LTIAP. CEC argues, therefore, that BPA knew that the 800 MW was inadequate.

BPA, however, has stated that the 800 MW limit is sufficient to meet non-federal Assured Delivery needs for the *near* future. The limit is not permanent. BPA has committed itself to reassess the limit when the third AC Intertie Project is energized or abandoned in 1993. LTIAP § 4(c)(1). Thus, BPA can accommodate any increased future needs of PG & E or other utilities.

[19] CEC also supports its contention that the limits on Assured Delivery are arbitrary by noting that a BPA staff witness stated that there was no analytic basis for the original 440 MW limit on exchanges, and that it was simply the product of subtracting 360 MW of firm power sales from a predetermined 800 MW limit. Then, when firm power sales in the final LTIAP were increased from 360 MW to 444 MW, the amount of additional Assured Delivery for exchanges automatically dropped to 356 MW, to preserve the 800 MW total. In response, BPA explained that the 800 MW limit was the operational estimate of the proper sum of exchanges and firm sales. Consequently, given that maximum, the amount of allowed exchanges varied as a function of the amount of allowed firm sales transactions. Thus, the allocation for exchanges was not arbitrary.

discerned.' " *Id.* (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974)). We conclude that the rationale for the 800 MW limit can reasonably be discerned from the Administrator's Decision.

c. Environmental Impacts

[13] Finally, there is support in the Administrator's Decision for BPA's concerns that Assured Delivery above 800 MW could harm the environment. *See* Ad. Dec. at 95, 99-100. Failing to limit exports of firm surplus power to an amount equal to the region's existing non-federal supply would enable and encourage Northwest utilities to increase their surplus supplies and marketing opportunities by developing new resources for export, which could adversely affect the Northwest environment. In addition, the Intertie Development and Use Environmental Impact Statement ("Use EIS") indicated that seasonal exchanges above 500 MW may also have a deleterious affect on the reservoir system of the Northwest. *Id.* at 99.

CED suggests that the LTIAP can avoid environmental problems associated with exchanges by structuring the exchanges differently (e.g., avoiding drawdowns on Northwest reservoirs during August by requiring nighttime energy returns from the Southwest when necessary to moderate reservoir fluctuations) rather than simply putting a limit on exchanges. CEC claims that BPA failed to evaluate sufficiently this and other alternatives. "While an agency may not rely on unsupported conjecture to explain its decisions, neither is an agency forced to document copiously every collateral inference it draws from its experience with a regulated industry and its general economic views." *Natural Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355, 1424 (D.C.Cir.1985)

(citations omitted). Here, BPA's projections are based upon the Intertie Development and Use EIS and upon its experience in the industry. Any prediction about the future impact of standards necessarily involves an informed attempt to resolve uncertainties. *Id.* BPA acknowledges that its conclusions are sensitive to changes in its assumptions and, accordingly, has been conservative in setting Assured Delivery limits. It has made a rational prediction in light of limited available evidence. Thus, BPA's environmental justifications for the 800 MW limit are not arbitrary or capricious.

E. The Fish and Wildlife Provisions of the LTIAP

[14] Section 7 of the LTIAP allows BPA to reduce the Formula Allocation of a non-federal utility that owns or acquires the output from a hydroelectric project located in a "protected area." Petitioner Puget Sound Power challenges this provision on two grounds: 1) that BPA has no authority to limit access to the Intertie because of a perceived impact of generating facilities on fish and wildlife; and 2) that such restrictions are the sole province of FERC through its licensing procedures. These arguments are without merit.

In *CEC,* we recognized BPA's "statutory obligation under the [Northwest Power Act] to use its 'authorities . . . to protect, mitigate, and enhance fish and wildlife' in the Columbia River basin. 16 U.S.C. § 839b(h)(10(A)." 831 F.2d at 1477. We also stated that the Northwest Power Act's "focus on preservation and conservation modifies BPA's preexisting directives. . . ." *Id.* at 1478. Finally, we held that BPA had the authority to ban all new resources from the Intertie in order to protect fish and wildlife, at least until the long-term policy was developed. Thus, in *CEC* we determined that BPA has at

least some authority to protect wildlife by imposing restrictions on Intertie access. We reserved ruling, however, on whether a wholesale ban on new generating sources would be reasonable in a long-term access policy. We do not face that question here. Unlike the interim policy, the LTIAP does not impose a wholesale ban on new generating facilities. It allows Intertie access to utilities acquiring energy from new projects outside protected areas. Although the *CEC* opinion addressed only the temporary NTIAP, nothing in the opinion suggests that BPA's authority to protect wildlife by restricting Intertie access should be reduced when a long-term policy is at issue. In fact, this authority would be meaningless if it did not apply to long-term access policies.

Puget Sound Power's related argument, that BPA is usurping FERC's authority, is similarly inconsistent with *CEC.* In upholding the NTIAP in *CEC,* we implicitly rejected the notion that exclusive authority to limit Intertie access in order to protect fish and wildlife is vested in FERC.

Conclusion

In drafting the statutes at issue here, Congress painted in broad strokes, outlining general directives for allocating Intertie access while delegating substantial discretion to the Administrator to develop specific access policies in compliance with those directives. Some of the petitioners have argued that the LTIAP does not go far enough to achieve a particular statutory goal, while others claim it goes too far. In light of the Administrator's many responsibilities, it is relatively easy for petitioners to focus solely on isolated responsibilities and argue that the LTIAP fails to meet those responsibilities to the fullest extent possible. The task of the Administrator, however,

was to consider and reconcile all of the responsibilities delegated to him by Congress. The LTIAP is not without flaws. Nevertheless, the Administrator has complied with statutory requirements while adequately balancing the varied interests of the petitioners. We conclude that BPA's actions and decisions in developing the LTIAP were not arbitrary and capricious and we affirm the LTIAP in its entirety.

AFFIRMED.

APPENDIX B

APPENDIX B

CALIFORNIA ENERGY RESOURCES
CONSERVATION
And DEVELOPMENT COMMISSION, Petitioner

v.

BONNEVILLE POWER ADMINISTRATION;
James J. Jura, as Administrator,*
and John S. Herrington, as Secretary of
the Department of Energy of the
United States of America, Respondents.

Public Utilities Commission of the
State of California, Petitioner

v.

JAMES J. JURA, as Administrator
of the Bonneville Power Administration*;
John S. Herrington, as Secretary of
the Department of Energy of the
United States of America;
and the United States of America, Respondents.

Nos. 84-7836, 85-7430, 84-7838 and 85-7470.

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* James J. Jura, the current Administrator of the Bonneville Power Administration, is substituted for his predecessor in office pursuant to Fed.R.App.P. 43(c)(1).

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 13, 1986.

Decided Nov. 6, 1987.

Before TANG, SCHROEDER and NORRIS,
Circuit Judges.

SCHROEDER, Circuit Judge:

Introduction

These are consolidated petitions to review the Bonneville Power Administration's [BPA] interim access policy for Pacific Northwest-Pacific Southwest Intertie, a system of high voltage lines transmitting federal and non-federal power from the Pacific Northwest to the Southwest. The petitioners are: (1) the California Public Utilities Commission (CPUC), a government entity responsible for insuring reasonable rates for the State's energy consumers, Cal.Pub.Util.Code §§ 301-322, and (2) the California Energy Resources Conservation and Development Commission (CEC), a state agency that adopts energy policies, forecasts energy needs, and certifies construction of power plants in California, Cal. Pub. Res. Code §§ 25200, 25216. The essence of their claim is that the access policy unlawfully excludes low cost energy generated in the Pacific Northwest and Canada from BPA's transmission lines and thus prevents that lower cost energy from reaching California electric power consumers.

This is the second challenge to the interim policy. In the first, we upheld it over the objections of the Los Angeles Department of Water and Power. *Department of Water & Power of the City of Los Angeles v. Bonneville Power Admin.*, 759 F.2d 684 (9th Cir.1985). Several of the

objections of these petitioners are similar to objections which we discussed in that case.

Before reaching the merits of petitioner's objections, however, we must first discuss a threshold jurisdictional question. The question is whether the policy can be considered final agency action that is now reviewable on the merits by this court, or whether the policy is in the nature of a rate that is not final, and therefore not yet subject to our review, until reviewed by the Federal Energy Regulatory Commission [FERC]. *See* 16 U.S.C. §§ 839e(i), (k); *Central Lincoln Peoples' Util. Dist. v. Johnson*, 735 F.2d 1101, 1109 (9th Cir.1984). We conclude that we have jurisdiction to review because the policy is not a rate. On the merits, we find no basis for overturning the agency's actions, adopting the policy on a temporary interim basis pending implementation of a long term policy.

Facts

In *Department of Water & Power*, this court recently set forth a description of BPA's operations and the provisions of the Intertie Access Policy. *See* 759 F.2d at 685-90. Because they are important to this case, we will again review the background facts.

BPA is a federal agency that markets hydroelectric power within the Pacific Northwest and oversees distribution of power from the Pacific Northwest to California and the Southwest desert. *See* 16 U.S.C. § 832a. Its operations are governed in part by the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (the Regional Act). The Regional Act prescribes procedures for setting and modifying rates for the sale and transmission of energy, and requires FERC approval of rates. 16 U.S.C. §§ 839e(i), 839e(k). It also requires BPA to establish rates that are sufficient to

insure BPA's fiscal independence. 16 U.S.C. § 839e(a)(1). BPA's operations are also governed by the Bonneville Project Act, 16 U.S.C. §§ 832-8321, the Pacific Northwest Power Preference Act, 16 U.S.C. §§ 837-837h, and the Federal Columbia River Transmission System Act, 16 U.S.C. §§ 838-838k. *See generally* Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act,* 58 Wash.L.Rev. 175 (1983).

In the late 1960's, Congress established the Pacific Northwest-Pacific Southwest Intertie. 16 U.S.C. §§ 838-838k. The purpose of the Intertie is to allow the Pacific Northwest and Pacific Southwest to exchange power when one region has a surplus supply and the other region has a heavy demand. BPA owns and operates most of the Intertie transmission lines above the Oregon-California border. A small group of California utilities owns the lines south of Oregon. *See Department of Water & Power,* 759 F.2d at 686.

On its lines, BPA transmits both federal "firm" and "nonfirm" power. Firm power is provided with the assurance of continued availability, and nonfirm power is provided only when supply exceeds firm power commitments. BPA also "wheels" non-federal firm and the less expensive nonfirm power for public and private utilities at established rates. *See id.* at 686. In selling its own firm and nonfirm power, BPA is statutorily required to give priority to purchasers within the Northwest, 16 U.S.C. § 837a, and to public bodies and cooperatives, 16 U.S.C. § 837c(a). Sales to purchasers outside the Northwest are limited to surplus energy, or energy "which would otherwise be wasted because of the lack of a market therefor in the Pacific Northwest at any established rate. 16 U.S.C. §§ 837(c), (d) and 837a.

Because the Intertie has a limited transmission capacity, BPA must provide for allocation of Intertie capacity among competing power producers. In allocating Intertie capacity, BPA is statutorily required to give itself priority. 16 U.S.C. § 837e. Any capacity in the Intertie "which is not required for the transmission of federal energy . . . shall be made available as a carrier for transmission of other electric energy." *Id.* Additionally, BPA "shall make available to all utilities on a fair and nondiscriminatory basis, any [excess] capacity in the Federal transmission system." 16 U.S.C. § 838d.

Before adoption of the policies challenged here, BPA generally allowed access to the Intertie to be determined by the spot market. This meant that producers offering the most attractive prices at any given moment could make sales and obtain Intertie access until capacity was reached. On September 7, 1984, BPA promulgated an interim Near Term Intertie Access Policy to provide a more predictable mechanism for allocating Intertie capacity. 49 Fed.Reg. 44,232 (Nov. 5, 1984). The policy was adopted after a series of public hearings and publication of notices in the *Federal Register. See* 48 Fed.Reg. 33,515 (July 22, 1983); 49 Fed.Reg. 5,990 (Feb. 16, 1984); 49 Fed.Reg. 30,346 (July 30, 1984); 50 Fed.Reg. 19,781 (May 10, 1985). In 1985, the Los Angeles Department of Water and Power challenged the policy as an abuse of discretion and beyond BPA's statutory authority. This court upheld the policy. *See Department of Water & Power,* 759 F.2d at 695.

On June 1, 1985, BPA adopted a revised Near Term Intertie Access Policy. *See* 50 Fed.Reg. 26,827 (June 28, 1985). This policy is substantially identical to the interim policy. Both policies are challenged here and are referred to collectively as the Access Policy.

Under the Access Policy, assured transmission service is available for firm power sold by Pacific Northwest producers to California purchasers under BPA-approved sales contracts. Extraregional producers, including Canadian producers, cannot obtain assured service for firm power. Any capacity on the Intertie in excess of firm power needs is sold on an hourly or daily ("nonfirm") basis under one of three "conditions." Revised Near Term Intertie Access Policy, 50 Fed.Reg. at 26,830-31.

Condition One incorporates the Exportable Energy Agreement of 1969. This Agreement becomes operative only when river flows into Pacific Northwest dams are sufficiently high to threaten wasteful "spillover" conditions. Under this Agreement, BPA and each Northwest utility that declares a surplus of energy at BPA's "applicable rate" may sell and transmit a pro rata portion of its surplus to California purchasers. Non-regional producers, like Canadian utilities, may not use the Intertie when the Exportable Agreement takes effect. *Id.* at 26,831.

Condition Two becomes operative when ever BPA and Pacific Northwest utilities have enough surplus nonfirm energy to fill the Intertie at any price. Again, access to the Intertie is limited to BPA and Pacific Northwest producers. Each receives access to a pro rata portion of its declared surplus. *Id.*

Finally, under Condition Three, which becomes operative only when BPA and the Northwest utilities lack sufficient surplus to fill the Intertie at any price, extraregional utilities, including Canadian utilities, may gain access to the Intertie. *Id.*

Although the revised Near Term Intertie Access Policy was originally set to terminate on September 30, 1986, with the adoption of a long term policy, BPA extended

the expiration date to June 30, 1987, to allow further evaluation of the long term policy. *See* 51 Fed.Reg. 23,819 (July 1, 1986). BPA has not yet adopted a long term policy, and the expiration of the interim policy has further been extended until June 30, 1988, or upon implementation of the long term policy, whichever occurs first. *See* 52 Fed.Reg. 9,530 (March 25, 1987).

Jurisdiction: Is the Policy a Rate?

CEC and CPUC argue here that BPA's adoption of the Access Policy constituted ratemaking and thus requires FERC approval before judicial review is available. The parties in *Department of Water & Power* did not raise this jurisdictional issue, and the court there did not address it. Since the question of jurisdiction was neither raised nor decided, this court's assumption of jurisdiction in *Department of Water and Power* does not establish controlling precedent on the appealability issue. *See Matter of Baker,* 693 F.2d 925, 925-26 (9th Cir.1982) (per curiam). Now that it is squarely presented, we must decide the issue.

The Regional Act requires BPA to set rates for electric power that are sufficient to cover costs and to recoup the federal investment in BPA's facilities "over a reasonable period of years." 16 U.S.C. §§ 839e(a)(1), 832f, and 838g. The Act prescribes procedures for establishing and modifying rates. The procedures include notice in the Federal Register, public hearings with limited cross-examination, and decisions on the record. *See id.* § 839e(i). FERC must approve rates before they become final and effective. *Id.* § 839e(a)(2). For a brief historical discussion of federal power marketing agencies' ratemaking and review procedures, see *United States v. Tex-La Elec. Co-op.,* 693 F.2d [sic] 392, 405-07 (5th Cir.1982).

Final rate determinations and other final agency actions are subject to original judicial review in this court. *See* 16 U.S.C. § 839f(e); *Public Util. Comm'n of the State of Calif. v. FERC,* 814 F.2d 560, 561 (9th Cir.1987); *California Energy Comm'n v. Johnson,* 767 F.2d 631, 633 (9th Cir.1985); *Central Lincoln Peoples' Util. Dist. v. Johnson,* 735 F.2d 1101, 1108-09 (9th Cir.1984). On review, we must affirm the agency's action unless it is arbitrary, capricious, an abuse of discretion, or in excess of statutory authority. 16 U.S.C. § 839f(e)(2); 5 U.S.C. § 706; *Department of Water & Power,* 759 F.2d at 690. Additionally, BPA's interpretation of the Regional Act is to be given great weight and should be upheld if reasonable. *Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.,* 467 U.S. 380, 389, 104 S.Ct. 2472, 2479, 81 L.Ed.2d 301 (1984); *California Energy Resources Conservation & Dev. Comm'n v. Johnson,* 783 F.2d 858, 860 (9th Cir. 1986), *modified,* 807 F.2d 1456, 1459 (1987).

This court's most recent discussions of BPA ratemaking are in *Atlantic Richfield Co. v. Bonneville Power Admin.*, 818 F.2d 701 (9th Cir.1987) (per curiam), and *City of Seattle v. Johnson*, 813 F.2d 1364 (9th Cir.1987) (per curiam). In *Atlantic Richfield*, we held that a "customer charge" imposed by BPA as part of its overall charge for energy is a rate for the sale or disposition of power and is subject to FERC review. 818 F.2d at 705. Similarly, in *City of Seattle*, we held that an "availability charge" imposed on certain contract customers is also a rate. 813 F.2d at 1367. The availability charge is a fee designed to recover some fixed costs associated with BPA's duty under the contracts to stand ready to deliver energy when demanded. We expressly rejected the utilities' contention that the availability charge was a penalty for not purchasing energy, rather than a rate. We reasoned that so limiting the meaning of "rate" would

improperly limit FERC's authority under the Regional Act to review BPA charges. *Id.*

Neither *Atlantic Richfield* nor *City of Seattle* is apposite to the facts presented here. As we noted in *City of Seattle*, "[r]ates are simply the charges BPA imposes on its customers for the provision of service." 813 F.2d at 1367; *see also Black's Law Dictionary* 1134 (5th ed. 1979) (defining "rate" when used in connection with public utilities as "price stated or fixed for some commodity or service . . . measured by a specific unit or standard"). In its rules establishing procedures for reviewing rates of other power marketing agencies, FERC itself defines a rate as "the monetary charge or the formula for computing such a charge for any electric service." 10 C.F.R. § 903.2(1).

The Access Policy, however, does not impose any charge at all or define any formula for computing charges. Nor does it give BPA authority to increase or decrease its own established charges for energy. Because it does not do so, FERC review of the Access Policy would not further the purposes of such review, which are first to insure that BPA's regional and nonregional rates are adequate and equitable, and second to insure that nonregional rates comply with BPA's organic statutes, *see* 16 U.S.C. § 839e(a)(2) and (k); *Central Lincoln Peoples' Util. Dist. v. Johnson*, 735 F.2d 1101, 1110-13 (9th Cir.1984). FERC apparently agrees, for it has stated that the Access Policy is not ratemaking subject to its approval. *See* 33 FERC (CCH) ¶ 61,235, at p. 61,486 (Dec. 12, 1985).

In support of their argument that adoption of the Access Policy constituted ratemaking, the petitioners here rely principally on *Portland General Elec. Co. v. Johnson*, 754 F.2d 1475 (9th Cir.1985). In that case, we

held that BPA's offer to sell energy to one class of customers at a rate approved for another class was ratemaking. *Id.* at 1481. We explained that "BPA's rates are not an interchangeable set of prices among which it is free to choose in any particular sale of energy . . . . A change in the availability provisions of the rate schedules constitutes ratemaking." *Id.* Similarly, in a companion case to *Portland General*, we held that BPA engaged in ratemaking when it agreed to purchase several regional utilities' scheduling rights to a nuclear power plant, and that agreement was "inextricably linked" to BPA's agreement to sell those same utilities federal power as replacement. *California Energy Resources Conservation & Dev. Comm'n v. Bonneville Power Admin.*, 754 F.2d 1470, 1474 (9th Cir.) (noting that "paying the buyer to buy is the same thing as reducing the price the buyer must pay"), *cert. denied,* 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 457 (1985). In both cases we concluded that agency action which had the effect of changing those schedules was ratemaking in nature.

Unlike the action in those cases, the BPA action challenged here does not conflict with the agency's existing rate schedules. The Access Policy is a formal statement of BPA's Intertie allocation policies. It does not make BPA energy available to purchasers at charges authorized for other purchasers or in any way attempt to avoid established rates. *See* Near Term Intertie Access Policy: Administrator's Record of Decision, at 11-16 (Sept. 1984) (Record of Decision I); Revised Near Term Intertie Access Policy: Administrator's Record of Decision at 11 (May 1985) (Record of Decision II).[1] At most, by alter-

[1]To the extent that the petitioners argue that adoption of the Access Policy contemporaneously altered the rates that apply to nonfirm energy, they are incorrect. Although BPA previously uses its

ing market forces the Access Policy can affect only the prices non-federal Pacific Northwest producers charge consumers. Yet the ratemaking provisions of 16 U.S.C. § 839e apply only to the rates for federal energy and for the transmission of non-federal power. *See* 16 U.S.C. § 839e(a).

Morover, the parties have not pointed to any allocation provisions of established rate schedules with which the allocation policies challenged here are inconsistent. They probably cannot do so because federal power marketing agencies generally have not included resource allocation policies in rate schedules. FERC defines a rate schedule as a statement describing rates and charges for service, the type of services to which the rates and charges apply, and the classifications and other provisions which directly affect the rates and charges. 18 C.F.R. § 300.1(7); 10 C.F.R. § 903.2(n). This definition does not include resource allocation decisions which indirectly affect prices of non-federal energy. Rather, before the more recent adoption of formal policies through rulemaking, power allocation decisions of federal power marketing agencies have principally been made on an ad hoc basis by the exercise of the agencies' contracting authority. *See Electricities of N. Carolina v. Southeastern Power Admin.*, 774 F.2d 1262, 1265 (4th Cir.1985); *cf. City of Santa Clara v. Andrus*, 572 F.2d 660, 673-74 (9th Cir.1978) (Secretary of Interior is not required to follow rulemaking proce-

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"spill rate" as the "applicable rate" under the Exportable Energy Agreement, its decision to apply the "standard rate" instead is specifically anticipated by the applicable rate schedule NF-83. *See* 33 FERC (CCH) ¶ 61,235, at p. 61,489. That schedule provides that nonfirm energy shall be sold at the standard rate, unless BPA "offer[s], at its discretion, to schedule Nonfirm Energy at the Spill Rate." By electing to exercise this discretion, BPA did not change any rates.

dures when disposing of federal hydroelectric power). Access has never historically been considered an aspect of rulemaking for before BPA adopted the Access Policy, it informally allowed access to the Intertie to be determined by the spot market. *See* Record of Decision I, at 39.

We consider the totality of the circumstances to determine if BPA action was ratemaking. *See Portland General,* 754 F.2d at 1481; *California Energy Resources Conservation & Dev. Comm'n v. Bonneville Power Admin.,* 754 F.2d at 1474; *see also City of Seattle,* 813 F.2d at 1367 n. 5. Upon examination of all of these considerations, we conclude BPA's action, which followed the rulemaking procedures, did not amount to ratemaking requiring FERC review. We therefore have jurisdiction to review the Access Policy.

The Merits

CEC and CPUC attack the Access Policy on essentially four grounds. Three of these grounds are discussed in *Department of Water and Power.* They are that the Access Policy lacks factual justification, that it is discriminatory in violation of 16 U.S.C. §§ 837e and 838d, and that it fails to conform to federal antitrust policy. We deal with those issues first. We then turn to the remaining issue not discussed in prior opinion, namely, that the policy excludes new generating sources in violation of 16 U.S.C. § 839f(d) and 837e.

A. Lack of Factual Justification

The petitioners argue that BPA's purported justifications for the policy lack a reasonable basis in fact and that BPA's action was therefore arbitrary, capricious, and

an abuse of discretion.[2] In *Department of Water and Power*, however, this court specifically found that the interim Access Policy was factually justified. There, we stated that "BPA has presented reliable evidence that without a policy which carefully allocates Intertie access, it will experience significant revenue shortfalls in coming years. To the extent that the IAP [the Access Policy] is designed to mitigate projected deficits, therefore, the policy is not only statutorily authorized but statutorily mandated." *Department of Water and Power*, 759 F.2d at 693. As the petitioners concede, the interim policy and the revised policy are identical for these purposes. They point to nothing in the record of the revised proceedings that would require reexamination of their contention. Therefore, our earlier determination forecloses review here. *See Royal Development Co. v. National Labor Relations Bd.*, 703 F.2d 363, 368 (9th Cir.1983). CEC's contention that *Department of Water and Power* should not control because the court there was unaware of BPA's huge net revenues and relied on conclusory evidence is merely an assertion that the case would have been decided differently on a different record. It does not provide a basis for disregarding the decision.

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[2]BPA's justifications include:

1. to "assure[] that BPA has use of its portion of the Pacific Intertie as necessary for BPA's power marketing program";

2. to "enhance[] BPA's ability to recover revenue that otherwise would be lost if BPA failed to manage prudently its portion of the Pacific Intertie"; and

3. to "respond[] to the recent influx of requests for more space on the Pacific Intertie that there is available capacity."

Near Term Intertie Access Policy, 49 Fed.Reg. at 44,233.

B. Discrimination

CEC and CPUC contend that the Access Policy discriminates against extraregional utilities in violation of 16 U.S.C. §§ 837e and 838d by denying them transmission access whenever a non-federal Pacific Northwest utility has unsold surplus available. Again, their challenge is foreclosed by *Department of Water and Power*. There, after specifically examining sections 837e and 838d, we stated that "BPA is required to allocate use of federally-owned transmission facilities in a manner which accords preference first to transmission of federal power and then to transmission of other Northwest-generated power." *Department of Water and Power*, 759 F.2d at 692-93, 695.

C. Antitrust Arguments

The petitioners challenge the Access Policy as failing to conform to the maximum extent possible to the federal antitrust laws and policies. We held in the *Department of Water and Power* case that the anticompetitive effects there challenged were justified by fiscal concerns. *Department of Water and Power*, 759 F.2d at 693. In addition, we observed in a footnote that the antitrust laws were not applicable to BPA. *Id.* at 693 n. 12. We did not in that decision discuss to what extent BPA may be required to consider the policies of the antitrust laws, though we did stress the monopoly power which it had been given. *Id.* at 693.

BPA is required to consider some federal antitrust policies when providing for allocation of Intertie capacity. Congress specifically articulated its intent that BPA operate its transmission lines in part "to prevent the monopolization thereof by limited groups." 16 U.S.C.

§ 832a(b).[3] This need to consider the interests of preserving competition, however, does not override BPA's statutory obligations, repeatedly expressed in 16 U.S.C. §§ 832f, 838g, and 839e(a)(1), to be fiscally self-supporting.

The aspect of the policy which the petitioners attack here and which was not dealt with in our prior decision in *Department of Water and Power* is the pro rata allocation formula for surplus nonfirm energy. Under the Access Policy, firm energy needs are satisfied first and any remaining capacity is used for nonfirm energy. Under Conditions One and Two, Intertie capacity for surplus nonfirm energy is allocated daily or hourly among BPA and Pacific Northwest producers so that each receives a pro rata portion of its declared surplus. Under Condition Three, capacity for surplus nonfirm power is allocated among BPA, Northwest producers, and extraregional producers again based on a pro rata portion of each producer's declared surplus. Revised Near Term Intertie Access Policy, 50 Fed.Reg. at 26,830-31. The result is a regularly shifting, horizontal division of the market for surplus nonfirm energy; each eligible producer is temporarily granted sole access to a specified share of the

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[3]This statutory language is more specific than the Federal Power Commission's broad authority to issue public utility securites if "compatible with the public interest," an authority which the Supreme Court held to incorporate from other sections of the Federal Power Act an obligation to consider federal antitrust policies. *See Gulf States Util. Co. v. Federal Power Comm'n*, 411 U.S. 747, 756-59, 93 S.Ct. 1870, 1876-78, 36 L.Ed.2d 635 (1973); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973) (rather than insulate electric power companies from antitrust policies, the Federal Power Act intended to incorporate antitrust concerns).

capacity, which it may either use or allow to remain unused without fear of competition by other producers.

CEC and CPUC argue that this pro rata allocation formula is an abuse of discretion because it is anticompetitive and BPA's stated justifications could be achieved by a less anticompetitive alternative. They assert that BPA should be required to adopt a policy whereby it would first allocate to itself whatever capacity is needed to satisfy its revenue obligations, and then allow the remainder capacity to be filled by competitive, spot market transactions rather than by the pro rata formula.

The alternative which petitioners now propose was apparently not, however, directly raised during the notice and comment proceedings for the policy on review here. The agency did not evaluate it and we have no record on which to review the petitioner's contentions. *See Kunaknana v. Clark,* 742 F.2d 1145, 1149 (9th Cir.1984); *see also Association of Data Processing Serv. Orgs. v. Board of Governors of the Fed. Reserve Sys.,* 745 F.2d 677, 684 (D.C. Cir.1984). During these interim phases of its action BPA and interested parties were concerned with the broader questions of its authority to allocate the Intertie as proposed.[4] In the circumstances presented here, where we deal with a temporary policy, and administrative proceedings on a long term policy are ongoing, we should defer consideration of the alternative proposed by CEC and CPUC until the agency has been given an opportunity

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[4]In its Record of Decision for the revised policy, BPA specifically stated that it elected in the interim proceedings to focus on questions regarding its statutory authority to allocate the Intertie capacity because it had never adopted an allocation policy before. *See* Record of Decision II, at 3. In the wake of this court's decision in *Department of Water and Power* upholding the interim policy, BPA did not reanalyze all of its prior decisions. *See Id.*

to analyze and act upon the alternative in its Long Term Policy.

We have reviewed the record to determine the reasonableness of BPA's evaluation of the alternatives it did have an opportunity to consider. There were two such alternatives, and both bear a close relationship to the alternative petitioners now propose.

One was that BPA reserve sufficient Intertie capacity for itself before providing any access to non-federal producers. The proponents of this alternative were concerned that BPA obtain the maximum revenues possible. *See* Record of Decision I, at 9. BPA rejected this proposal for the interim Near Term Policy because it believed that it could satisfy its revenue obligations without adopting such an extreme policy. The agency noted that the Access Policy's provisions for firm access would enable it to increase revenues by insuring that firm energy would be sold at firm energy rates. *See id.* at 9-11. It also believes that its role as a federal steward for transmission services would be best served by sharing the Intertie with Pacific Northwest producers. *See id.* The agency again rejected the alternative in its revised policy when its experience in recovering revenues under the initial Near Term Policy showed its revenue expectation to be justified. *See* Record of Decision II, at 18. Given these justifications and the experience under the initial policy, the agency's decision to reject this alternative in favor of the adopted allocation formula was rational. *See Motor Vehicles,* 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

Other parties expressed concern that the allocation formula was anticompetitive and recommended that BPA retain its practice of allowing spot market transactions to determine access to the Intertie for surplus nonfirm energy. *See* Record of Decision I, at 35-36. In response,

BPA found that the monopsony power of California buyers prevented the market from being competitive even under the spot market practice and that the distressed prices stemming from the monopsony power resulted in BPA revenue shortfalls. *See id.* at 2, 40. It also found that a pro rata formula would help to equalize Intertie benefits between Pacific Northwest producers and California buyers of energy. *See id.* at 39-41. Finally, the agency remarked that the proposed policy was not as anticompetitive as the opponents asserted because it opened up a new market for firm energy and because other market forces still worked to encourage Pacific Northwest sellers to retain prices competitive with alternate forms of energy. *See id.* at 36-44. After several months experience with the interim policy, BPA reevaluated the anticompetitive effects in promulgating the revised policy. Based on data of non-federal prices provided by the parties, it found that although its revenues had increased as a result of firm energy sales over the Intertie, Pacific Northwest prices had not risen significantly. *See* Record of Decision II, at 1, 7-8. The agency explained that Pacific Northwest producers must still compete with other energy sources. *See id.* at 8. Also, the allocation mechanism results in overestimation of available Intertie capacity and, therefore, producers must remain price competitive to make sales. *See id.*

To counter concerns that the pro rata formula would result in unused Intertie capacity from higher prices, BPA initially proposed an economic override provision that would allow it to reduce the pro rata share of non-federal producer if that producer's share would go unused because of its rates. *See* Record of Decision I, at 33-35. Almost all parties that commented on this provision, including both Pacific Northwest and California parties, objected to this provision as being too intrusive of the

business practices to the parties. *See id.;* Record of Decision II, at 41-43. Given the widespread objection to what was intended to be a mitigation provision in favor of California energy buyers, BPA's rejection of the economic override alternative was reasonable.

On the basis of the record before us, we cannot say that the agency's interim decision to allocate the Intertie as undertaken in the Access policy is arbitrary, capricious, or an abuse of discretion. Rather, the record shows that among the alternatives proposed and considered, BPA adopted what it reasonably believed would be a predictable, fair, and nondiscriminatory basis for allocating the Intertie while insuring adequate BPA revenues.

D. Exclusion of New Generating Sources

With the exception of two specific sources, the Access Policy denies access for firm power to Pacific Northwest resources not operational on September 7, 1984. *See* Revised Near Term Intertie Access Policy, 50 Fed.Reg. at 26,828-29. CEC argues that this exclusion discriminates against utilities which develop new generating sources in violation of 16 U.S.C. §§ 837e and 839f(d).[5] Because CEC represents California energy interests, it has standing to challenge the overall exclusion of new generating sources which may result in higher prices to California consumers. *See California Energy Resources Conservation & Dev. Comm'n v. Johnson,* 783 F.2d 858, 860 n. 2 (9th Cir.1986), *modified,* 807 F.2d 1456 (1987); *California Energy Resources Conservation & Dev. Comm'n v. Bonneville Power Admin.,* 754 F.2d 1470, 1473 (9th Cir.), *cert. denied,* 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 457 (1985).

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[5]CPUC does not raise a similar challenge.

Section 9(d) of the Regional Act requires that in providing transmission access BPA not discriminate against a utility on the basis of independent development of resources. 16 U.S.C. § 839f(d).[6] From this language CEC finds a statutory obligation to provide Intertie access to all new generating sources. Section 9(d), however, specifically states that the duty to provide nondiscriminatory service is "subject to . . and other obligations under existing law." *Id.* BPA points to two other obligations to justify its decision to exclude newly operational resources under the interim and revised Near Term policies.

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[6] In full, section 9(d) provides:

> (d) Disposition of power which does not increase amount of firm power Administrator is obligated to provide to any customer [sic]
>
> No restrictions contained in subsection (c) of this section shall limit or interfere with the sale, exchange or other disposition of any power by any utility or group thereof from any existing or new non-Federal resource if such sale, exchange or disposition does not increase the amount of firm power the Administrator would be obligated to provide to any customer. In addition to the directives contained in subsections (i)(1)(B) and (i)(3) of this section and subject to:
>
> (1) any contractual obligations of the administrator,
>
> (2) any other obligations under existing law, and
>
> (3) the availability of capacity in the Federal transmission system,
>
> the Administrator shall provide transmission access, load factoring, storage and other services normally attendant thereto to such utilities and shall not discriminate against any utility or group thereof on the basis of independent development of such resource in providing such services.

16 U.S.C. § 839f(d).

The first is BPA's statutory obligation under the Regional Act to use its "authorities . . . to protect, mitigate, and enhance fish and wildlife" in the Columbia River basin. 16 U.S.C. § 839b(h)(10)(A); *see* Record of Decision I, at 82-85; *see also Forelaws on Board v. Johnson,* 743 F.2d 677, 682 (9th Cir.1984), *cert. denied,* __ U.S. __, 106 S.Ct. 3293, 92 L.Ed.2d 709 (1986).[7] During notice and comment proceedings, interested parties expressed concern that the policy "not enable or encourage resources which adversely affect anadromous fish." Record of Decision I, at 66. BPA was legitimately concerned lest its allocation policy encourage new development harmful to fish and wildlife.[8] By excluding new generating sources in its interim and revised Near Term policies, BPA could avoid encouraging harmful development while it evaluated less restrictive alternatives. BPA could also pursue

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[7]Section 4(h)(10)(A) provides:

> The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this chapter and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this chapter. Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.

16 U.S.C. § 839b(h)(10)(A).

[8]The Access Policy also restricts access by existing resources when it will result in a use of resources that adversely affects fish and wildlife. *See* Revised Near Term Intertie Access Policy, 50 Fed.Reg. at 26,829. CEC does not contend that BPA lacks authority to establish this condition for access.

its statutory obligation to be fiscally self-supporting while it developed an alternative.[9]

Additionally, under the National Environmental Policy Act [NEPA], 42 U.S.C. §§ 4321-4361, BPA must prepare an environmental impact statement before undertaking any action that would significantly affect the quality of the environment. *See Forelaws on Board v. Johnson*, 743 F.2d 677, 681-82 (9th Cir.1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 3293, 92 L.Ed.2d 709 (1986). Because of the uncertain impact of the allocation policy on the environment, the agency reasonably concluded that it should exclude new generating sources in the interim and revised Near Term policies.

CEC nevertheless recites 16 U.S.C. § 837e is support of its assertion that the exclusion provision exceeds statutory authority. That section provides that the Intertie "shall be made available as a carrier for transmission of [non-federal] electric energy." 16 U.S.C. § 837e.[10] CEC

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[9]The Near Term Policy expressly indicates that the Long Term Policy will eliminate the total exclusion of new generating sources in favor of a less restrictive exclusion. As anticipated, the Long Term Policy will exclude new resources "*if* construction or operation of these resources will adversely impact fish and wildlife resources." *See* Revised Near Term Intertie Access Policy, 50 Fed.Reg. at 26,830 (emphasis added).

[10]§ 837e. Transmission lines for other electric energy; rates

> Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas. The transmission of other electric energy shall be at equitable rates determined by the Secretary, but such rates shall be subject to

argues that it mandates access to all new sources regardless of environmental impact. The legislative history of the subsequently enacted Regional Act makes clear, however, that environmental concerns are to be given a heightened priority and that the Regional Act "creates a new obligation on the region, the BPA, and other Federal agencies to protect, mitigate and enhance fish and wildlife." 126 Cong.Rec. 29809 (1980) (statement of chief sponsor Rep. Dingall), *reprinted in United States Department of Energy, Legislative History of the Pacific Northwest Power Planning and Conservation Act* 138 (1981); *see* 16 U.S.C. § 839(6); *see also* 126 Cong.Rec. 27825 (1980) (statement of Rep. Bonker) ("The language in this bill — if interpreted according to the historical development and record of this legislation — will insure that power needs and fish needs are considered equally in the allocation of available water resources. That is the intent of Congress."), *reprinted in Legislative History* at 190. The Regional Act's focus on preservation and conservation modifies BPA's preexisting directives emphasizing widespread use of energy, sound business principles, and the lowest rates possible. *See* Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act,* 58 Wash.L.Rev. 175, 232-35 (1983).

We deal here with an interim ban. The petitioners do not point to any planned source which has yet been

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equitable adjustment at appropriate intervals not less frequently than once in every five years as agreed to by the parties. No contract for the transmission of non-Federal energy on a firm basis shall be affected by any increase, subsequent to the execution of such contract, in the requirements for transmission of Federal energy, the energy described in section 837h of this title, or other electric energy.

16 U.S.C. § 837e.

affected adversely. Although we do not purport to decide whether an absolute exclusion of new generating sources would be reasonable in a long term access policy, the present interim exclusion of new generating sources is not facially invalid.

The petitions are DENIED.

NORRIS, Circuit Judge, dissenting:

I am troubled by Judge Schroeder's opinion in this obviously important case. While it may be that *Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration*, 759 F.2d 684 (9th Cir.1985), forecloses appellants' claims that the BPA's Interim Access Policy arbitrarily favors the BPA itself and discriminates against Canadian utilities in violation of the statutory mandate,[1] that case does not foreclose a challenge to the BPA's policy of discriminating against Pacific Southwest utilities and energy consumers in favor of Pacific Northwest utilities.

The BPA's pro rata allocation scheme for available intertie capacity — a scheme which if implemented by a private party would plainly violate the antitrust laws — paternalistically restricts price competition among Northwest utilities and denies Southwest utilities and energy consumers the benefit of free market pricing for surplus energy offered for sale by privately-owned Northwest utilities. The interim access policy's interference with free

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[1]Parenthetically, it also seems to me that the panel in *Department of Water & Power* may have wrongly decided the Canadian issue. The exclusion of Canadian power, though arguably unobjectionable in its discrimination against Canadian producers, also discriminates against Southwest energy purchasers — intended beneficiaries of the intertie. That issue may be important enough to merit en banc consideration.

market pricing simply creates a cartel for the Northwest utility companies in the sale of power to the Southwest.[2] The BPA's statutory mission, however, does not extend to acting as the guardian angel for Northwest utilities in their market relationship with Southwest utilities. If Northwest energy companies believe that the Southwest utilities are exercising some sort of unfair monopsony power, let them sue under the applicable antitrust laws. It is not the mission of the BPA to fight this battle for the Northwest utilities through the promulgation of a regionally biased access policy.

I can see no statutory authority under which the BPA is authorized to discriminate so clearly in favor of Northwest utilities and against Southwest utilities and energy users. Indeed, the relevant statutory language appears to point the other way. The anti-competitive, pro-Northwest utility slant of the pro rata intertie access plan seems plainly incompatible with the statutory language requiring that the BPA be "fair and non-discriminatory" in its treatment of *all* utilities, 16 U.S.C. § 838d, as well as the clear understanding recognized in *Department of Water & Power* that the purpose of the intertie was to benefit both the Northwest and Southwest, 759 F.2d at 694.

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[2] To the extent that Northwest utilities are under no obligation to use their pro rata share of intertie access, the BPA's interim plan also acts as a restriction on output. Output restrictions, like restrictions on price competition, raise prices above the competitive market level. Thus, the interim access policy — suppressing both prices and output — is a double curse for Southwest utilities and energy consumers.

APPENDIX C

APPENDIX C

DEPARTMENT OF WATER AND POWER
OF
THE CITY OF LOS ANGELES,
Petitioner

v.

BONNEVILLE POWER ADMINISTRATION,
Respondent.

No. 84-7618

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 16, 1985.

Decided April 24, 1985.

Before KILKENNY, GOODWIN and
SKOPIL, Circuit Judges.

GOODWIN, Circuit Judge.

The Department of Water and Power of the City of Los Angeles brings a direct appeal[1] challenging a policy implemented by the Administrator of the Bonneville Power Administration [BPA] which allocates use of electricity transmission lines connecting the Pacific Northwest with California. Reviewing the regulation in light of the broad

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[1]The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h, makes this court a court of original jurisdiction for suits challenging BPA administrative actions. 16 U.S.C. § 839f(e)(5). Any "final actions and decisions . . . or the implementation of such final actions" taken pursuant to any of the four enabling statutes are subject to direct review by the Ninth Circuit. *See Forelaws on Board v. Johnson*, 743 F.2d 677, 679 (9th Cir.1985); *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1108 (9th Cir.1984)

range of powers statutorily granted to the Administrator, we uphold the validity of the regulation.

This case asks whether, to what extent and for what reasons, BPA can exercise control over the marketing of electricity generated in the Pacific Northwest. Like many similar cases, this one involves a complex web of four federal statutes and a complex factual background.[2] The real issue here is whether the City of Los Angeles can purchase low-cost electricity from vendors in Canada and transmit that electricity at rates favorable to Los Angeles contrary to the pricing strategy of the Administrator.

The City of Los Angeles provides electricity to customers in and near Los Angeles. Bonneville Power Administration is a federal agency within the Department of Energy organized for three purposes: to produce electric power at the Bonneville Dam on the Columbia River, to market power produced from numerous dams on the Columbia River as part of the Federal Columbia River Power System, and to supervise distribution of power within and from the Pacific Northwest. BPA itself is subject to regulatory supervision by the Federal Energy Regulatory Commission. 16 U.S.C. §§ 839e(i)(6), 839e(k).

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[2]The four federal statutes provide the statutory authority for electricity generation, regulation and marketing of electricity in the Pacific Northwest and for the marketing of Northwest electricity in the Pacific Southwest. Those statutes are the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h ["Northwest Power Act"], the Federal Columbia River Transmission System Act, 16 U.S.C. §§ 838-838k. ["Columbia River Act"], the Pacific Northwest Power Preference Act, 16 U.S.C. §§ 837-837h ["Preference Act"], and the Bonneville Project Act, 16 U.S.C. § [sic] 832-8321. ["Project Act"].

Producers of electricity in the Pacific Northwest are linked to producers and consumers of electricity in the Pacific Southwest through the Pacific Northwest-Pacific Southwest Intertie, a system of three high-voltage transmission lines.[3] BPA owns and operates almost all of the lines north of the Oregon-California and Oregon-Nevada borders. South of Oregon, the lines are owned by a number of California utilities. The City owns 40 percent of one of those lines.

The purpose of the Intertie, established by Congress in the late 1960's, *see* Pub.L. No. 88-257, 77 Stat. 844 (1964); Pub.L. No. 88-511, 78 Stat. 682 (1965) (appropriations for construction of the Intertie), is to even out the peaks and troughs in the production and consumption of power between the Northwest and the Southwest. At certain times of year the Northwest produces more electricity than it can use and the Southwest experiences particularly heavy electricity consumption. At other times, the Northwest has heavy demand and the Southwest can produce surplus power. By allowing electricity to flow either north or south, each region can assist the other during times of heavy demand.[4]

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[3]Although the Intertie was designed to link the Northwest with the Southwest, the system is being used largely by Northwest and California utilities. A new Intertie connection between the Northwest and Arizona is planned. *See* BPA, *Columbia River Power for the People: A History of Policies of the Bonneville Power Administration* 237-46 (1981).

[4]It is useful to think of the Intertie as a pipeline in which electricity flows. The electricity can flow in either direction: from Pacific Northwest producers to California consumers or from California producers to Northwest consumers. Like a pipe, the Intertie has a finite capacity for transmitting electricity flows. In recent years, the flow in the Intertie has been almost entirely from the Northwest to California. Heavy river volume and lower than projected electricity demand in

BPA produces approximately half the hydroelectric power sold in the Pacific Northwest. The remainder is produced by 15 publicly-owned or investor-owned utilities. BPA and the other utilities store the generation capacity of hydroelectric energy as water, held behind dams with finite storage capacities. This means that the generation capacity is perishable, because limits to storage and replenishment depend upon reservoir capacity and river flows. As a result, a major responsibility of BPA is the management of water levels consistent with seasonal water flows and electricity demands.

The water management process is complicated because the seasonal periods of high and low river flow do not necessarily correspond to seasons of high and low electricity demand. In marketing hydroelectric energy, BPA must distinguish between power which can be generated during periods of the lowest river flow and power which can be generated only during peak river flow. A distinction has arisen, therefore, between so-called firm power (which is always available) and so-called nonfirm or interruptible power (which is available only during peak river flows). *See ALCOA v. Central Lincoln Peoples' Util. Dist.*, ____ U.S. ____, 104 S.Ct. 2472, 2475, 81 L.Ed2d 301 (1984).

Over the years, BPA has entered into numerous contracts for the sale of firm power, both within the Northwest and outside the region. BPA has had such a contract

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the Northwest have resulted in consistent surpluses of Northwest electricity. Furthermore, the cost of Northwest hydroelectric power (the source of most Northwest electricity) historically has been less than the cost of thermal power produced in California, making it financially attractive for California utilities to purchase as much Northwest electricity as the Intertie can hold. *See generally* D.W. Meek, *Pacific Northwest Conservation for California: The Mutual Benefits of Long Term Cooperation*, 13 Environmental Law 841 (1983).

with the City. The City also buys nonfirm hydroelectric power from BPA from time to time as it is available and as the City has demanded for it. During times of electricity shortage, parties to firm power contracts receive priority over any nonfirm energy purchasers. *See e.g.* 16 U.S.C. § 837f; *ALCOA,* 104 S.Ct. at 2477-79.

In the sale of both firm and nonfirm power, BPA is statutorily required to give priority to purchasers within the Northwest, 16 U.S.C. § 837a, and to public bodies and cooperatives, 16 U.S.C. § 832c(a). Sale to utilities outside the region is limited to electricity "which would otherwise be wasted because of the lack of a market therefor in the Pacific Northwest at any established rate." 16 U.S.C. §§ 837(c), 837(d). This electricity is known as surplus power.

Sale of any power by a Northwest utility to a California utility, such as the City requires the transmission of that power to the California purchaser. The Intertie transmits this energy. But, because there are many purchasers of power and because seasonal availability may affect the amount of power which utilities wish to transmit over the Intertie to California purchasers, BPA must allocate Intertie capacity among both purchasers and producers.

In allocating Intertie capacity among itself and other Northwest electricity producers, BPA is statutorily required to give itself preference. 16 U.S.C. § 837e. Any capacity in the Intertie "which is not required for the transmission of Federal energy . . . shall be made available as a carrier for transmission of other electric energy . . ." *Id.*

When Northwest utilities must generate more electricity than they can possibly use in the Northwest (to avoid the wasteful spilling of water over their dams), the

electricity so generated is sometimes not only too much to be used in the Northwest but also exceeds the capacity of the Intertie to transmit.

To allocate Intertie capacity for surplus power sales outside the region, BPA has entered into an agreement with Northwest utilities known as the Exportable Agreement.[5] The Exportable Agreement allocates Intertie capacity among competing producers during times of potential spillover by permitting each Northwest utility to sell a pro rata portion of its surplus power to California purchasers and to transmit that power over the Intertie until Intertie capacity has been reached. When the Exportable Agreement triggers an allocation of scarce Intertie capacity, nonregional producers (*i.e.,* electricity producers in Canada) are precluded from using the Intertie. That agreement was, until the policy which is the subject of this litigation, the only means of allocating Intertie capacity.

In the past, when river flows did not threaten a spillover condition, BPA did not regulate Intertie access. Instead, BPA allowed access to the Intertie (up to its maximum capacity) to both Northwest and Canadian utilities. Market forces determined how much energy each Northwest or Canadian utility could sell to purchasers in California. If Canadian utilities offered the most attractive price to California purchasers, for example, those utilities were permitted to use potentially all Intertie capacity, at the exclusion of Northwest utilities which were offering less attractive prices. Canadian producers

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[5]Agreement Executed by the United States of America Department of the Interior by and through the Bonneville Power Administrator and Utilities in the Pacific Northwest (BPA Contract No. 14-03-73155, January 13, 1969).

as a group have been the second largest user of Intertie capacity, after BPA itself.

There are several different ways by which California utilities purchase Northwest power. The first, known as a bilateral purchase, is a spot-market purchase of electricity. After the seller and purchaser agree upon a price, quantity and duration, the energy is "wheeled" over the Intertie directly from the producer to the purchaser.[6] Wheeling agreements provide a significant percentage of the energy needs of some California utilities including the City.[7]

The second major power sale arrangement is the exchange agreement. An exchange agreement is a reservation by a purchaser to borrow electricity which is later returned to the producer. A purchaser reserves capacity on the Intertie to accommodate the electricity it needs to borrow (usually for peak daily usage), and reserves capacity to return the same amount of electricity at a later time (often the same day) when its own generation capacity is not being fully used. Because this energy transaction is used to accommodate peak electricity de-

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[6]Wheeling is the procedure by which the owner of transmission lines transmits electricity produced by another party for a specified charge. *See* M.C. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash.L.Rev. 175, 212-13 (1982). While the statutory authority for BPA wheeling originally was doubtful, wheeling has long been a BPA practice. *See* BPA, *Columbia River Power for the People: A History of Policies of the Bonneville Power Administration*, 201-07 (1981); Columbia River Act, 16 U.S.C. § 838d.

[7]Such agreements help California utility entities avoid the cost of building expensive generating plants to accommodate demand which arises only during peak daily usage. Of course, Northwest utilities also benefit from the sale of electricity which might otherwise be wasted. *See generally* D.W. Meek, 13 Environmental Law 841.

mands, the arrangement is known as a peaking return exchange agreement. The energy so transmitted is known as obligation energy. Because the Intertie can be used for transmitting electricity either to the north or to the south, the Intertie can be used for both ends of the transaction: the borrowing of electricity during peak times by California utilities and the return of electricity to Northwest utilities during California's off-peak hours.

The City and BPA have had a long-standing exchange agreement. Because market conditions in recent years have made Canadian power very attractive, however, the City has been satisfying its obligation to return borrowed energy by purchasing electricity from British Columbia Hydro Authority and having that electricity returned to BPA at the British Columbia — Washington border. Consequently, the Intertie has been used by the City to borrow BPA power but not to return the obligation energy. BPA and the City have an ongoing dispute over whether this arrangement is permissible under their exchange agreement. [8] BPA has demanded that the City return obligation energy at the same location where it borrows it: the Oregon — Nevada border. If the City did return borrowed electricity in the manner demanded by BPA, Intertie capacity would be needed for both borrowed and return obligation energy meaning that less power could be transmitted from north to south on the Intertie.

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[8]The City has sued the federal government over the BPA interpretation of the exchange agreement. *Department of Water & Power of the City of Los Angeles v. United States*, No. 181-84C (U.S.Ct.Cl. pending). Each party has claimed the other to be in material breach of the exchange agreement.

BPA INTERTIE ACCESS POLICY: THIS DISPUTE

BPA is facing a potentially significant revenue shortfall in coming years which may jeopardize its ability to recover costs as is required by the Columbia River Act. *See* 16 U.S.C. § 838g(3). It is this threat which BPA cites as a primary reason for the policy which is the subject of this litigation. The agency offers two explanations for this unanticipated revenue shortfall. First is a lower-than-expected demand for firm power from those industrial customers who purchase huge quantities of electricity directly from BPA. Many of these customers are large aluminum producers which have been affected by a depressed aluminum market. *Cf. ALCOA*, 104 S.Ct. at 2478. Secondly, BPA has sold less than predicted amounts of surplus power to extraregional utilities. In part because of lower prices offered by Canadian vendors to California customers (including the City), the market has shrunk for BPA surplus power. *See Calif. Energy Resources Cons. and Develop. Comm'n v. BPA*, 754 F.2d 1470, 1472 (9th Cir.1985); *Portland Gen. Elec. Co. v. Johnson*, 754 F.2d 1475, 1477-78 (9th Cir.1985).

On September 7, 1984, BPA promulgated its Near Term Intertie Access Policy [IAP]. 49 *Fed.Reg.* 44,232-38 (November 5, 1984). The policy was adopted after a series of public hearings and *Federal Register* notices. 48 *Fed.Reg.* 33,515 (July 22, 1983) (notice of intent to develop policy on Intertie access); 49 *Fed.Reg.* 5,990 (Feb. 16, 1984) (comments on notice of intent); 49 *Fed.Reg.* 30,098 (July 13, 1984) (proposed Intertie Access Policy). *See generally* Near Term Intertie Access Policy: Administrator's Record of Decision (September 7, 1984). The policy is to remain in effect until May 1, 1985, at which time the agency will decide on a Long Term

Intertie Policy. 50 *Fed.Reg.* 6,379 (Feb. 15, 1985) (extending expiration date from March 1 to May 1, 1985).

While the IAP sets out three different allocation formulae for different market and electricity supply conditions, several assumptions underlie all three formulae. Priority in access to the Intertie is always afforded to Northwest electricity suppliers selling firm power to California purchasers. IAP ¶ D.1, 49 *Fed.Reg.* at 44236. The IAP assures delivery of power for existing firm power contracts, IAP ¶ D.1.a., and allows those Northwest utilities capable of doing so to enter into additonal firm power contracts with California utilities. IAP ¶ D.1.b. Among those contracts which will be afforded assured delivery are exchange agreements including that between BPA and the City. Only after firm power contracts are satisfied will BPA allocate Intertie access for movement of nonfirm power. IAP ¶ D.2. Canadian utilities can never use the Intertie to transmit firm power. IAP ¶ E.

Once firm power contracts are satisfied, formulae for allocation of Intertie capacity for nonfirm energy depend upon supply and demand under three different conditions.

Condition 1 applies when there is a surplus of Northwest electricity and Northwest utilities are willing to sell electricity to California purchasers at a BPA-established rate. This portion of the IAP does not change existing BPA policy; it incorporates the terms of the Exportable Agreement. IAP ¶ D.2.b.(1). The City does not challenge this formula.

Condition 3 is the opposite of Condition 1. IAP ¶ D.2.b.(3). This formula applies when: (1) demand for Intertie use among Northwest utilities is less than available Intertie capacity, and (2) California utilities want to

purchase more electricity than Northwest utilities have available to sell but the amount available will not fill the Intertie to capacity. Under this condition, BPA makes Intertie transmission capacity freely available to any Northwest or Canadian utility desiring access. The City does not challenge this formula.

The text of the Condition 2 formula appears in the margin.[9] Condition 2 applies when there is a slight oversupply of Northwest electricity but not such an extreme oversupply that Northwest utilities must generate excess electricity to avoid spilling water over their dams. IAP ¶ D.2.b.(2). In this situation (when California utilities are willing to purchase, and Northwest utilities are willing to sell, more electricity than the Intertie can handle), there is competition among Northwest utilities. Canadian utilities may not use the Intertie to enter the competition unless those utilities first enter into acceptable planning agreements with BPA. IAP ¶ E.3. No Canadian utilities currently have acceptable agreements with BPA.

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[9](2) *Condition 2.* When the Exportable Agreement allocation formula is not in effect, but BPA and other Scheduling Utilities declare amounts of power available for access to the Pacific Intertie that exceed the available Intertie Capacity determined as described in paragraph a. above, the capacity will be allocated pursuant to the following procedure:

(a) On any day the Scheduling Utilities observe as a normal workday, each Scheduling Utility shall submit to BPA declarations of daily quantities of energy and hourly capacity it has available for sale to the Southwest for the period beginning at midnight of the day of declaration and continuing through midnight of the next normal workday.

(b) Allocations for each hour among Scheduling Utilities will be determined and will approximate the ratio of each Scheduling Utility's declaration to the sum of all declarations for each hour multiplied by the available Intertie Capacity . . . .

IAP ¶ D.2.b.(2), 49 *Fed.Reg.* at 44,237.

Under Condition 2, all Northwest utilities (and qualified Canadian utilities, if any) wishing to sell power would notify BPA of the amount of power available for sale each day. If the total available power is greater than Intertie capacity, each seller (including BPA) is allocated a share of Intertie capacity based upon a pro rata reduction from its declared available electricity, just as it is under Condition 1. Allocations cannot be exceeded or traded even if a utility later discovers it requested too much or too little capacity.

The effect of Condition 2 is to reduce competition among Northwest utilities both for Intertie capacity and for California purchasers and to equalize the prices at which Northwest power can be sold. The question on which this litigation turns is whether the Condition 2 restrictions are consistent with BPA's statutory authority.

One related issue also has been raised in this litigation. The City challenges the formula by which the IAP calculates Intertie capacity for the purpose of allocating access under Condition 2. Instead of allocating physical Intertie capacity, BPA allocates net scheduled Intertie capacity. IAP ¶ A.8. Scheduled Intertie capacity is a measure not of physical capacity but of "capacity . . . controlled . . . through ownership or contract right." That capacity includes the amount of any return electricity which California utilities are obligated to return to Northwest utilities pursuant to peaking return exchange agreements. *Id.* Because peaking return exchange agreements permit the utilities to use the Intertie, the BPA definition presumes that all electricity transactions as part of those agreements use the Intertie.

The scheduled capacity would be, therefore, larger than the physical capacity of the line if all parties to exchange

agreements actually used the Intertie to return their obligation energy. But some utilities do not use the Intertie to satisfy their return obligations. The City, for example, satisfies its obligations by purchasing from British Columbia Hydro Authority electricity which is delivered to BPA without passing through the Intertie. Other utilities may purchase electricity from one Northwest utility and have that electricity transmitted to another Northwest utility to satisfy peaking return obligations. That energy, also, does not pass through the Intertie. Because scheduled capacity allocates capacity which need never be physically used, the City argues that it is arbitrary and capricious for BPA to use scheduled rather than actual capacity to allocate Intertie access.

THIS COURT'S REVIEW

This detailed history provides the background for our analysis of the case at bar. The City asks this court to find that the IAP exceeds BPA's statutory authority and is arbitrary and capricious. Under the Administrative Procedure Act, this court may set aside an agency action if it is found to be arbitrary, capricious, an abuse of discretion, or in excess of statutory authority. 5 U.S.C. § 706(2). This standard of review is highly deferential and assumes the agency action to be valid. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d. 136 (1971). Insofar as agency action is the result of its interpretation of organic statutes, the agency's interpretation is to be given great weight. *ALCOA,* 104 S.Ct. at 2479-80 (discussing BPA administrative actions).

In reviewing actions BPA takes under its enabling legislation, this court gives substantial deference to the agency for three reasons. First, the enabling legislation is

highly technical and complex. Second, the agency was intimately involved in the drafting and consideration of the legislation at the time of its passage. *ALCOA*, 104 S.CT. at 2480. Finally, Congress has, for nearly half a century, monitored BPA performance in electricity regulation and allocation. Statutory interpretations offered by BPA represent "contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). *See Central Lincoln Peoples' Util. Dist. v. Johnson,* 686 F.2d 708, 710-11 (9th Cir.1982), *rev'd on other grounds,* ____ U.S. ____, 104 S.Ct. 2472, 81 L.Ed.2d 301. *See also American Paper Inst. v. American Elec. Power Service Corp.,* 461 U.S. 402, 423, 103 S.Ct. 1921, 1933, 76 L.Ed.2d 22 (1983).

Nevertheless, in making this review, this court must determine whether the challenged decision was based upon a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park,* 401 U.S. at 416, 91 S.Ct. at 823. While this court may not substitute its judgement for that of the Bonneville Power Administrator, its factual inquiry is to be "searching and careful." *Id.*

ALLOCATION OF INTERTIE CAPACITY[10]

We first examine the Administrator's authority to allocate use of the Intertie. Each of the four applicable statutes imposes restraints upon the manner in which

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[10] The City only challenges Intertie allocation under Condition 2. We therefore address only those restrictions which apply under that Condition.

BPA may exercise its discretion in managing electricity and operating the Intertie. A review of applicable legislation reveals the boundaries of BPA authority.

The Project Act authorizes and directs BPA to construct, operate and maintain the Intertie for transmitting federal energy. 16 U.S.C. § 832a(b). The Act makes no reference to sharing these facilities with other electricity producers. Preference in BPA sale of electricity is to be accorded to public bodies. 16 U.S.C. § 832c(a). Consequently, allocation of Intertie use is not inconsistent with BPA's statutory authority to use the federally-owned portions of the Intertie in any manner consistent with "transmitting electric energy, . . . from [BPA] to existing and potential markets . . . ." 16 U.S.C. § 832a(b).

The Preference Act was passed at the time the Intertie plan was considered and approved. *See* Pub.L. No. 88-257, 77 Stat. 844 (1964); Pub.L. No. 88-511, 78 Stat. 682 (1965) (appropriations for construction of the Intertie). The purpose of the Act was, *inter alia,* to permit interconnection of the Bonneville power system with the systems of other regions without the risk that BPA's customers in the Pacific Northwest would lose their preference for electricity needed to meet present and future needs. H.R.Rep. No. 590, 88th Cong., 2d. Sess., *reprinted in* 1964 U.S.Code Cong. & Ad. News 3342, 3342-43 (1964). Congress was concerned to ensure that this interconnection, so vital to the economic interests of both the Northwest and the Southwest, was not made at the expense of the lowcost electricity needed to support economic growth in the Northwest. *Id.* at 3342-44. At the same time that Congress recognized the availability of electricity surplus to the needs of the Northwest, it also recognized the temptation for consumers elsewhere in the West to use

this cheap power for their own economic development at the expense of the Northwest. *Id.* at 3343-44.

The Act establishes a preference both for electricity sales, 16 U.S.C. § 837a, and for use of Intertie capacity to transmit that electricity. 16 U.S.C. § 837e. This is also the statute which limits the sale, delivery or exchange of BPA electricity outside the Northwest to "surplus energy and surplus peaking capacity." 16 U.S.C. § 837a. Surplus energy is defined to be that energy which would otherwise be wasted because of the lack of a market in the Northwest. Surplus peaking capacity is that peaking capacity for which there is no demand in the Northwest at any established rate. 16 U.S.C. § 837(c), (d).

Transmission lines used for BPA energy in the Northwest are to be made available to other users if not needed by BPA, 16 U.S.C. § 837e. The legislative history of the Act explains that

> In determining the existence of capacity excess to the needs of the Government, Federal needs reasonably foreseeable may be included, but the Secretary may not decline to enter into [agreements to 'transmit other utilities' power] merely because he may have energy available for sale to serve the same load.

H.R.Rep. No. 590; 1964 U.S.Code Cong. & Ad.News at 3350. BPA is permitted, therefore, to reserve sufficient Intertie capacity not only for its current needs but also for its "foreseeable" future needs, so long as the agency does not compete with other utilities on the mere speculation that it "may have energy available" sometime in the future to sell to the same customer.

Underlying Congressional passage of the Preference Act was its concern to ensure that BPA could repay the huge federal debt incurred in constructing Northwest

hydroelectric facilities. *See* 1964 U.S.Code Cong. & Ad.News at 3382 (Additional views of Rep. Craig Hosmer). In its statement of the need for the Preference Act, the House Committee explained that construction of the Intertie would permit BPA to raise additional revenue which "would go a long way toward putting the Bonneville power system back on a sound financial basis." H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3343.

The City has argued that the IAP violates the Preference Act, 16 U.S.C. § 837e, by automatically giving BPA priority in sale of electricity to California regardless of market price and competition from other Northwest electricity producers. Nevertheless, it is clear from the legislative history that Congress did not intend BPA to compete with other Northwest utilities for access to the Intertie. The theme of the Act is that BPA, as owner and operator of the Intertie, should be allowed preference in transmission of its electricity over the Intertie as necessary to meet its statutory mandate of being self-financing. Only if the agency still has capacity remaining on the Intertie after it has sold available and foreseeable power, is it required to make the Intertie available to other utilities.

The Columbia River Act deals primarily with financing arrangements for BPA. The Act does, however, require BPA to make its facilities available to all utilities fairly once its own needs are satisfied:

> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the [Intertie] which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

16 U.S.C. § 838d.

Neither the Act nor the Congressional Report provide any further guidance for the Administrator's discretion in making excess capacity available to other utilities. The Act recognizes, however, that BPA must make available only excess capacity, not all Intertie capacity.

The Northwest Power Act reaffirms the authority of BPA to allocate and manage Intertie capacity. 16 U.S.C. § 839f(i)(1)(B). BPA is explicitly limited to providing transmission services over the Intertie which are "not in conflict with the [BPA's] other marketing obligations," *id.*, and which do not cause a "substantial interference with [the BPA] power marketing program . . . ." 16 U.S.C. § 839f(i)(3).[11] *See* H.R.Rep. No. 976, Part II, 96th Cong.2d Sess., *reprinted in* 1980 U.S.Code Cong. & Ad. News 5989, 6054.

The City argues that the IAP alters free market forces which would otherwise alocate Intertie access according to price and demand. The City's argument, however, fails because electricity generation, transmission and distribution in the Pacific Northwest have not been subject to free market forces since passage in 1937 of the Project Act which created a virtual federal monopoly over transmission of hydroelectric energy in the region. Notwithstanding the fact that BPA has permitted the operation of market forces to allocate Intertie usage at some times in the past, Congress has repeatedly expressed its intent that BPA control sale and transmission of power in the Northwest consistent with Congressional statements of policy. *See* H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3342-44; H.R.Rep. No. 976, Part I, 96th

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[11]The IAP was likewise designed to "enhance BPA's power marketing program." 49 *Fed.Reg.* at 44233.

Cong., 2d Sess., 1980 U.S.Code Cong. & Ad.News at 5989- 93.[12]

The history of BPA's enabling legislation further demonstrates that Congress has repeatedly required BPA to operate in a manner which assures that the agency is fiscally self supporting. *See* 16 U.S.C. § 832f (BPA rate schedules designed to recover BPA costs) H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3343 (statute designed to put BPA back on sound financial ground); 16 U.S.C. § 838g(2) (rate schedules to be based upon BPA need to recover operating and capital costs); 16 U.S.C. § 839e(a)(1) (rates to be designed consistent with sound business principles and with need to recover BPA costs); H.R.Rep. No. 976, Part I, 1980 U.S.Code Cong. & Ad.News at 6001 (BPA must be self supporting and must maintain financial independence subject to Congressional oversight). While market forces at times in the past may not have threatened BPA's Congressional mandate, BPA has presented reliable evidence that without a policy which carefully allocates Intertie access, it will experience significant revenue shortfalls in coming years. To the extent that the IAP is designed to mitigate projected deficits, therefore, the policy is not only statutorily authorized but statutorily mandated. *Calif. Energy Resources,* 754 F.2d at 1472; *Portland Gen. Elec. Co.,* 754 F.2d at 1477-78.

These four statutes show repeated Congressional insistence that BPA have preference in using Intertie capacity and that, so long as the agency is fair and nondiscriminatory, BPA have the discretion to allocate remaining trans-

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[12]The City argues that, by displacing competition, the IAP violates the antitrust laws. That argument is frivolous because the antitrust laws do not apply to the federal government. *See Sea-Land Service, Inc. v. Alaska R.R.,* 659 F.2d 243, 244 (D.C.Cir. 1981).

mission capacity. Under this court's narrow review, the IAP is neither arbitrary and capricious, nor an abuse of discretion nor in contravention of statutory authority. This court need not find that the BPA interpretation of the four statutes " 'is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' We need only conclude that it is a reasonable interpretation." *ALCOA*, 104 S.Ct. at 2480, quoting, *American Paper Inst.* 461 U.S. at 423, 103 S.Ct. at 1933.[13]

EXCLUSION OF CANADIAN POWER

The City argues that the IAP violates BPA's statutory mandate to provide Intertie access to power generated in Canada. 16 U.S.C. § 837e *See* H.R.Rep. No. 590, 1964 U.S.Code Cong. Ad.News [sic] at 3350 (Canadian energy "stands on the same basis as any other non-Federal energy"); 16 U.S.C. § 838d (capacity must be made available on a fair and nondiscriminatory basis). The IAP currently prohibits Intertie access for Canadian power under Conditions 1 and 2.[14]

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[13]The legislative scheme is confusing and overlapping. It is not at all clear that Congress considered all the ramifications of the language used in different enactments since the Project Act was enacted in 1937. Nevertheless, statutes dealing with the same subject must be read together and harmonized where possible. *See* 2A *Sutherland on Statutory Construction* § 52.02. The BPA policy is not inconsistent with the legislative scheme and is not an abuse of discretion.

[14]Access by Canadian utilities under Condition 2 is dependent upon those utilities' "participation in the Pacific Northwest's coordinated planning and operation to a greater extent than in the past, or agreement to provide other appropriate consideration of value to the Pacific Northwest." IAP ¶ E.3, 49 *Fed.Reg.* 44237. This clause is entirely consistent with the environmental planning concerns expressed in the Northwest Power Act. *See* 16 U.S.C. § 839b. As we

There are two types of Canadian power for which Intertie access could be provided. The first is Canadian treaty power, *see* 16 U.S.C. § 837h, which is firm power generated in the Northwest as a result of water flows from dams on Canadian rivers. Columbia River Basin Treaty, 15 U.S.T. 1555, TIAS No. 5638 (Jan. 17, 1961). *See* M.C. Blumm, 58 Wash.L.Rev. at 215-19; BPA, *Columbia River Power for the People: A History of Policies of the Bonneville Power Administration* 227-36 (1981). Firm treaty power is not affected by this litigation.[15] BPA is obligated to afford preference to firm treaty power. 16 U.S.C. §§ 837e, 837h.

The second type of power is nontreaty surplus power which Canadian utilities particularly B.C. Hydro) sell to California utilities and which is wheeled to those purchasers over the Intertie. Surplus power does not enjoy any preference at all. The agency:

> *may enter into agreements* for the wheeling of energy generated in Canada, but such energy . . . does not have the priority granted to Federal energy and Canada's entitlement to [treaty] power benefits. . . .

H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3350 (emphasis added). That statement is in contrast to the immediately prior paragraph in the legislative history which *requires* BPA to make excess Intertie capacity available to other non-Federal utilities.

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have already noted, negotiations to enter into such an agreement have not been successful.

[15]Because Canada did not need the power to which it was entitled under the Treaty, treaty power was sold back to BPA under the Canadian Storage Power Exchange. BPA sold this firm power to California utilities. The last remaining contract for the sale of this power to California utilities expired two years ago. *See* D.W.Meek 13 Env'tl L. at 894-96.

The legislative history of both the Preference Act and the Columbia River Act demonstrates that Congress intended that the Intertie be used primarily for the benefit of Northwest and Southwest utilities and not for the benefit of Canadian utilities. *Cf.* 16 U.S.C. § 838d (excess intertie capacity to be made available on a fair and nondiscriminatory basis); H.R.Rep. 93-1375, 93d Cong.2d Sess., *reprinted in,* 1974 U.S.Code Cong. & Ad.News 5810, 5814 (section 838d "is not intended to represent a policy having application other than in the Pacific Northwest"). While Canadian treaty power is to be accorded preference in Intertie allocation, nontreaty power is given nonpreference Intertie access, only once BPA chooses to exercise its authority to enter into wheeling agreements. The legislative history indicated no Congressional mandate that BPA must enter into such agreement. *See* H.R.Rep. No. 590, 1964 U.S.Code Cong. & Ad.News at 3350. *See generally* U.S. Dep't of the Interior, Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest, at X, 2, 33-34 (1964) (discussing allowing Intertie access for Canadian treaty power without any reference to other Canadian power sales).

ALLOCATION OF SCHEDULED CAPACITY

Instead of allocating physical Intertie capacity, the IAP allocated contractual electricity flow, known as scheduled capacity. The agency's use of scheduled capacity is based on the agency's conclusion that the scarce commodity being allocated is not physical Intertie capacity but interregional energy exchange between California and the Northwest. Because of exchange agreements,

electricity is transmitted both into and out from both regions. Consequently, the IAP allocates the sum total of all energy exchange, whether or not the energy is physically transmitted over the Intertie. This enables BPA to coordinate scheduling of Intertie access so that purchases and sales between utilities can be offset against each other. Allocation of scheduled capacity is apparently an established industry practice designed to promote equitable cost sharing and efficient planning. Evidence presented by BPA suggests that this is a more efficient use of the Intertie than is allocation according to physical capacity.[16]

Although the City's objections to the use of scheduled capacity as unwise may have some validity, a court is not the proper forum in which to address such extremely technical, discretionary issues. Scheduling transmission service capacity is a highly technical field. Congress has consistently committed broad discretion to BPA. This court does not substitute its judgment for that of the administrative agency in technical fields within the agency's unique expertise. *ALCOA,* 104 S.Ct. at 2480; *Pacific Gas & Elec. Co. v. FERC,* 746 F.2d 1383, 1387 (9th Cir.1984). *See Cincinnati Gas & Elec. Co. v. FERC,* 724 F.2d 550, 554 (6th Cir.1984).

CONCLUSION

The four BPA enabling statutes must be read in *para materia.* Two common themes appear clear from these

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[16]The agency has presented evidence to show that, in the last five months of 1984 (including four months in which the IAP controlled Intertie access), the Intertie was used to 93 per cent of its capacity. During a comparable period in 1983, the Intertie was used to 81 per cent of capacity. The BPA attributes this 12 per cent increase in Intertie usage to more efficient allocation of capacity under the IAP.

statutes. The first is that BPA is required to market federal power in a manner which ensures that the agency is self-supporting. Secondly, BPA is required to allocate use of federally-owned transmission facilities in a manner which accords preference first to transmission of federal power and then to transmission of other Northwest-generated power. Once such preferences are accommodated, the agency is prohibited from denying access to the Intertie by other extraregional utilities within the United States. BPA is permitted, but not required, to enter into wheeling agreements to transmit Canadian-generated power.

Recognizing these common themes, we find that the IAP is consistent with BPA statutory authority and is not an arbitrary and capricious exercise of its discretion. Accordingly, we uphold the validity of the Near Term Intertie Access Policy.

APPENDIX D

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ENERGY COMMISSION,
Petitioner,

PUGET SOUND POWER & LIGHT COMPANY,
WASHINGTON WATER POWER COMPANY ("WWP"),
Petitioner-Intervenor

v.

BONNEVILLE POWER ADMINISTRATION;
U.S. DEPARTMENT OF ENERGY;
Respondents

ASSOCIATION OF PUBLIC AGENCY CUSTOMERS; PUBLIC POWER COUNCIL; PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON; PACIFICORP, DBA PACIFIC POWER & LIGHT COMPANY ("PACIFIC"); PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON; WESTERN PUBLIC AGENCIES GROUP ("WPAG"); MONTANA POWER COMPANY; CITY OF SEATTLE, CITY LIGHT DEPARTMENT ("CITY"); PUBLIC GENERATING POOL ("PGP"); EUGENE WATER & ELECTRIC BOARD ("EWEB"); DIRECTOR SERVICE INDUSTRIAL CUSTOMERS ("DSIS")
Respondent-Intervenor

CA No. 88-7280
DC No. 0972-2; LTIAP

PACIFIC NORTHWEST GENERATING COMPANY
("PNGC")
Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION;
U.S. DEPARTMENT OF ENERGY;
UNITED STATES OF AMERICA,
Respondents.

CA No. 88-7315
DC No. 0979-3; NPA

VANALCO INC.; ALUMINUM COMPANY OF AMERICA;
COLUMBIA FALLS ALUMINUM COMPANY;
Petitioners,

WASHINGTON WATER POWER COMPANY ("WWP");
PUGET SOUND POWER AND LIGHT COMPANY,
Petitioner-Intervenor

v.

BONNEVILLE POWER ADMINISTRATION;
Respondent

PORTLAND GENERAL ELECTRIC COMPANY; ASSOCIATION OF PUBLIC AGENCY CUSTOMERS; ARCO; MONTANA POWER COMPANY; PUBLIC GENERATING POOL ("PGP"); EUGENE WATER & ELECTRIC BOARD ("EWEB"); NON-GENERATING PUBLIC UTILITIES ("NGPU"),
Respondent-Intervenor

CA No. 88-7318
DC No. 0979-3; LTIAP

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,

PUGET SOUND POWER AND LIGHT COMPANY;
THE DEPARTMENT OF WATER & POWER OF THE
CITY OF LOS ANGELES; PUBLIC SERVICE DEPARTMENT
OF THE CITY OF BURBANK; PUBLIC SERVICE
DEPARTMENT OF THE CITY OF GLENDALE;
WATER & POWER DEPARTMENT OF THE CITY
OF PASADENA; SAN DIEGO GAS & ELECTRIC
COMPANY AND SOUTHERN CALIFORNIA EDISON COMPANY;
PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner-Intervenor,

v.

BONNEVILLE POWER ADMINISTRATION;
U.S. DEPARTMENT OF ENERGY,
Respondents,

PACIFIC POWER & LIGHT COMPANY;
EUGENE WATER & ELECTRIC BOARD ("EWEB");
PUBLIC GENERATING POOL ("PGP");
NORTHWEST POWER PLANNING COUNCIL;
DIRECT SERVICE INDUSTRIAL CUSTOMERS ("DSIS"),
Respondent-Intervenor.

CA No. 88-7319
DC No. 0971-3; LTIAP

ORDER

BEFORE: CANBY AND LEAVY, CIRCUIT JUDGES AND ORRICK DISTRICT JUDGE*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable William H. Orrick, Senior United States District Judge, for the Northern District of California, sitting by designation.

APPENDIX E

APPENDIX E

LONG-TERM INTERTIE ACCESS POLICY

GOVERNING TRANSACTIONS OVER FEDERALLY OWNED PORTIONS OF THE PACIFIC NORTHWEST — PACIFIC SOUTHWEST INTERTIE

U.S. DEPARTMENT OF ENERGY
BONNEVILLE POWER ADMINISTRATION
MAY 17, 1988

EXECUTIVE SUMMARY
LONG-TERM INTERTIE ACCESS POLICY

U.S. DEPARTMENT OF ENERGY
BONNEVILLE POWER ADMINISTRATION
MAY 17, 1988

INTRODUCTION

The Pacific Northwest-Pacific Southwest Intertie began operation in 1968. Congress authorized the construction of the Intertie to provide an additional market for surplus BPA power, thereby providing greater assurance that we would repay the U.S. Treasury for the Federal investments in the Northwest's power system. To the extent there was capacity excess to Federal needs, Congress also intended that the Intertie allow nonfederal utilities in the Northwest and California to take advantage of the diverse load patterns and resource types between the two regions.

The present capability of the Intertie is about 5,200 megawatts (MW), 3,200 MW on the two alternating-current (AC) lines and 2,000 MW on the direct-current (DC) line. Ownership of the Intertie in the Northwest is shared by BPA, Portland General Electric Company (PGE) and Pacific Power & Light Company (PP&L). We provide access to all Northwest generating utilities. Ownership in California is shared by four investor-owned and municipal utilities.

In the early 1980s demand for sales over the Intertie increased dramatically. Nearly every utility in the Northwest had excess power to sell and forecasted a surplus into the next decade and beyond. Northwest utilities frequently filled the Intertie with nonfirm energy and sought to negotiate long-term transactions with California. Prior to 1984 and the implementation of the Interim Intertie Access Policy (IAP), BPA lost significant revenue opportunities by allowing other utilities unfettered access to the Intertie. Combined effects of (1) the Northwest Preference Act, 16 U.S.C. § 837, *et seq.*, which gives Northwest utilities a special competitive advantage over us; (2) oversupply conditions in the Northwest; and (3) a

restricted market in California due to limited ownership of the Intertie in California caused us to lose sales. We were unable to make our payments to the U.S. Treasury.

In 1984 we implemented the Interim IAP, followed by the Near-Term IAP in 1985. These policies governed access to the Intertie while we developed a Long-Term Intertie Access Policy (LTIAP).

The LTIAP, issued by the Administrator on May 17, 1988, accomplishes the following objectives which have guided us throughout the process:

1. The LTIAP assures BPA of reasonable access to the Intertie to sell both firm and nonfirm energy, thereby enhancing our ability to repay, with interest, $8 billion in Treasury investments.

2. The policy is a reasonable and effective means of safeguarding our $120 million investment in fish and wildlife protection.

3. It balances the competing demands of nonfederal utilities for Intertie access to sell, exchange, or purchase both firm power (through long-term contracts) and nonfirm energy (through the short-term, spot-market).

4. It provides a basis for greater planning certainty to utilities.

5. It allows for efficient use of generating resources in the Northwest and California.

6. It specifically addresses competitive concerns between California and the Northwest.

7. In doing all of the above, it strikes a balance between the Northwest and California, among generating and nongenerating utilities, other BPA

customers, environmental interests and Federal taxpayers.

Issuance of this policy culminates our review of comments submitted by over 150 different utilities, regulatory agencies and interest groups. Through a combination of formal, transcribed meetings and informal discussions, we have increased our knowledge of their positions — and they of ours. We have twice appeared before the U.S. House Subcommittee on Water and Power Resources to answer questions regarding the IAP. Though often cumbersome and lengthy, the process has produced a policy which addresses the demands of all parties.

Balancing interests. We have been put in the difficult position of balancing the competing interests for use of the Intertie. The sum of the demands placed on the Intertie far exceeds the facility's ability to meet them.

Our total-requirements customers insist that BPA should protect its revenues in order to maintain stable power rates and to repay the U.S. Treasury in a timely manner. They suggest that BPA should allocate firm and nonfirm Intertie access to itself first, always assuring that BPA would be able to sell its surplus power. Northwest generating utilities seek a policy which allows sufficient and assured access for their own firm and nonfirm sales. California parties generally argue for a policy which allows them unconstrained access to inexpensive Northwest and Canadian resources. Environmental organizations support a policy that would prevent the Intertie from encouraging development that would harm fish and wildlife resources.

Our main concern in reaching this balanced policy has been reconciling BPA's need to meet its fiscal obligations with these other competing demands for use of the Inter-

tie. While BPA has the discretion to implement the "Federal-first" policy supported by our full requirements customers, the LTIAP instead provides significant access to nonfederal utilities for a variety of transactions while protecting BPA from revenue shortfalls.

It is not reasonable to suggest, as California commenters did in the public process, that BPA incur revenue losses to be recovered through rate increases to its total-requirements customers. These customers have a strong statutory argument — explained in the decision — that we should adopt a Federal-first policy to maximize Federal sales over the Intertie. By rejecting Federal-first, we incur an obligation to provide these customers with rate stability through alternative means. First among these alternative protections is the reservation of Intertie capacity for BPA sales.

If the revenue-protective measures adopted in the LTIAP prove unworkable or unduly controversial, the obvious remedy is not more access for nonfederal utilities. Instead, it is Federal-first.

FORMULA ALLOCATION

The Intertie accomodates transactions in two distinct markets. Sellers of power to California sell in two distinct markets, one for long-term transactions and one for short-term sales. Formula Allocation in the LTIAP refers to Intertie capacity made available for short-term sales of energy. We have taken a hard look at Formula Allocations as it has been one of the most hotly debated issues throughout the LTIAP's development.

The LTIAP continues the basic Formula Allocation method used in the Near Term Intertie Access Policy (NTIAP) of allocating access to the Intertie based on

three possible conditions. We have changed the specifics of each Condition to reflect criticisms and suggestions made on the two LTIAP drafts. Provisions for Conditions 2 and 3 address directly the contentious anti-competitive concerns between California and the Northwest.

Condition 1. Condition 1 under the NTIAP incorporated the pre-existing Exportable Agreement, which expires on December 31, 1988. Parties to the agreement declare amounts of surplus energy available for export at the applicable BPA rate. If total declarations of exportable energy exceed the available Intertie Capacity or the size of the Pacific Southwest market, whichever is smaller, each party to the agreement is allocated access to the smaller amount based on its share of total declarations.

The 1986 draft LTIAP proposed that upon expiration of the Exportable Agreement a condition of spill or likelihood of spill on the Federal Columbia River Power System (FCRPS) would trigger Condition 1. BPA and Northwest Scheduling Utilities could declare surplus energy available for export and BPA would allocate access to the Intertie based on the ratio of each declaration to the sum of all declarations multiplied by the available Intertie Capacity. Each Scheduling Utility's allocation would be limited by the ratio of its regional hydroelectric capacity to the total regional hydroelectric capacity of the Scheduling Utilities multiplied by the total of all declarations (the "Hydro Cap").

We received comments on the 1986 draft which led us to revise Condition 1 to mirror the Exportable Agreement more closely. Under the 1987 draft a condition of spill or likelihood of spill on the FCRPS determined Condition 1. BPA and Scheduling Utilities could declare surplus energy available for export at the applicable BPA rate and

receive a share of available Intertie Capacity based on the Hydro Cap. To the extent that the market for Northwest energy at BPA's price was less than the available Intertie Capacity, we allocated access to the Intertie to equal that market.

Generally, commenters on the 1987 draft did not argue against Condition 1 per se. They focused instead on its specific provisions. The bulk of the comments were directed at the Hydro Cap and at allocating Intertie capacity based on the size of the California market rather than the size of the Intertie capacity. In response to concerns heard at the public meetings in January 1988, we proposed an alternative Condition 1 allocation method. The LTIAP adopts this recent proposal.

The True-Up. The market for power in California is often less than the available Intertie capacity because of minimum generation requirements in California. As the Intertie is expanded and Southwest utilities bring on new generation that cannot be displaced with spot-market purchases, the frequency of this situation is likely to grow.

The 1987 draft allocated Intertie capacity based on the size of the California market as a protection against revenue shortfalls. Analyses indicated that we would lose approximately $16.4 million in 1989 by allocating to the Intertie rather than the market. This loss would decrease to $10.7 million in fiscal year 1992. Beyond 1992 the difference would increase, mainly due to projected fuel price increases.

The heart of the revenue problem is the Northwest Regional Preference Act. 16 U.S.C. 837, *et seq.,* which requires BPA to quote an energy price to Northwest utilities before making any sale to the Southwest. This

creates a problem in which Northwest utilities, which are BPA's competitors, know our price — but we do not know their prices. In Condition 1, where the size of the Southwest market is less than available Intertie Capacity, Northwest utilities are able to use this information to undercut the BPA price and use their allocations to reduce BPA's hourly sales to a small Southwest market. If a "real-time" BPA pricing iteration were even possible, we would still be required to announce our new price to the Northwest. Regional preference makes BPA a "sitting duck" for its competitors.

Allocating according to the California market size would reduce BPA's vulnerability by reducing the size of Scheduling Utility allocations. This provision came under attack, however, from both California and Northwest parties. The alternative discussed at the January 27 public meeting seemed to allay concerns regarding BPA's market control. No one disputes that the Regional Preference Act causes BPA a revenue dilemma, especially at times when we face spill on the hydro system. The true-up alternative is the least intrusive remedy.

The Hydro Cap. Both the 1986 and 1987 LTIAP drafts allocated Intertie capacity based on a utility's hydroelectric capability. The logic for the Hydro Cap was that when the Federal system is spilling or likely to spill, the maximum allocation to utilities with greater hydroelectric resources would increase, thus decreasing the probability of wasting the resources by spilling. Under this provision, BPA's share of allocations would tend to increase due to its large hydroelectric capacity.

Much of the debate over the Hydro Cap focused on two issues. First, removing the Hydro Cap could cause hydro-based utilities to spill. Second, without the Hydro Cap, utilities could "overdeclare" by including uneconomic

combustion turbines in their declarations with no intent of ever operating them.

Discussion at the January meetings helped resolve these concerns. When the Federal hydro system faces spill, other systems might not always be in the same condition. The Hydro Cap could give disproportionately large shares of Intertie Capacity to hydro-based utilities when they may not face a threat of spill, while frustrating the marketing activities of utilities with hydro and thermal resources. Furthermore, several utilities and BPA indicated that if a utility is facing spill with insufficient access to market the available energy on the Intertie, such energy could generally displace Northwest thermal generation.

Several factors would help deter overdeclarations. First, the take-or-pay feature of our IS-87 transmission rate requires a utility to pay for its allocation whether or not it is used. Second, BPA monitors declarations and is aware of each utility's resources and capabilities. We have not observed significant overdeclarations under past policies. Third, from time to time we can request documentation on each utility's declaration as a further insurance against abuse.

Conditions 2 and 3. Allegations of anti-competitive practices on both the northern and southern portions of the Intertie were made during the debate over Formula Allocations. California commenters argue that pro-rata allocations to nonfederal utilities under the LTIAP would tend to stabilize prices at levels higher than those at which sellers might increase their total sales by reducing prices. The Northwest just as logically concludes that pro-rata allocations of California Intertie capacity suppress prices below levels that would prevail in a market

where more buyers independently bid for Northwest energy.

We recognized that in implementing a long-term policy we must try to resolve this issue to meet the goals outlined for the LTIAP. We therefore proposed in section 5(d) of the 1987 draft LTIAP to cease pro-rata allocations to non-Federal utilities under Conditions 2 and 3 after completion of the third AC Intertie, provided anti-competitive problems in the Southwest were cured by that time. This proposal was discussed extensively during the public meetings in January 1988 and again in comment letters, mainly from California parties. The final LTIAP takes this proposal a step further. Section 5(d) now ceases pro-rata allocations under Conditions 2 and 3 for an 18-month experimental period.

We will analyze the success or failure of the experiment throughout its term. We will be particularly concerned about the removal of restrictions on California's portion of the Intertie. Utilities, regulators, and other interested parties will be encouraged to express their views in writing and through informal discussions. At least 30 days before the experiment ends, we will issue a written report on whether to continue the experiment.

The experiment will work as follows. Under Condition 2, when the declarations of BPA and Northwest utilities exceed Intertie capacity, we will make a pro-rata allocation to BPA and leave the remaining block of Intertie capacity available to Northwest utilities as a whole. Each Northwest utility could then compete to make sales to Southwest utilities, with no assurance of any individual allocation. Under Condition 3, when the declarations of BPA and Northwest utilities are less than Intertie capacity, we will again make a pro-rata allocation to BPA and a block allocation to Northwest utilities. After regional

utilities, U.S. extraregional utilities and then Canada have access to remaining Intertie capacity. During Condition 3, we expect significant competition whenever the size of the California market is less than Intertie capacity.

Until the experiment is in effect, Conditions 2 and 3 are similar to those in the NTIAP and the two LTIAP drafts.

The LTIAP retains pro-rata allocations under Condition 1. Allocation under Condition 1 appears to be of less concern to California commenters than allocation during other conditions. Alternative Formula Allocation proposals recognized the importance of pro-rata allocations when the Northwest faces spill conditions. Retention of Condition 1 allocations will (1) help assure nonfederal utilities of Intertie access when hydrological conditions might otherwise force them to spill, and (2) provide an enforcement mechanism for the Protected Area provisions described below.

Some commenters have suggested that we allow access to Canadian utilities equal to that of Northwest utilities. The courts, however, have upheld our policy that capacity excess to our needs must be provided on a fair and nondiscriminatory basis first to Northwest utilities. If the Free Trade Agreement between Canada and the United States now being considered in Congress and the Canadian parliament is implemented, the distinction between U.S. extraregional utilities and Canadian utilities will no longer be made.

ASSURED DELIVERY

Utilities seek firm access to the Intertie for long-term transactions. The LTIAP refers to this kind of access as

Assured Delivery. The earlier NTIAP did not provide for Assured Delivery service.

Amount. The final LTIAP reserves 800 MW for Assured Delivery transactions. This is an increase from the 420 MW reserved in the 1986 draft. BPA lost $213 million in fiscal year 1987; we do not want to exacerbate this problem with the final LTIAP. Given these uncertainties, we are cautious about committing major portions of the Intertie for long-term nonfederal use.

Yet, the 800 MW upper limit in itself is a fairly dramatic departure from the past. It will facilitate a greater number and variety of firm transactions than before. Our studies indicate an annual revenue loss of approximately $9 million in lost nonfirm revenue and displaced firm power sales to our public agency customers. The revenue effects on BPA have been quantified further in a study by the PNUCC. These adverse revenue effects, offset by mitigation measures discussed below, have been found acceptable by a fairly broad cross-section of commenters.

In the public meeting and comment letters, most parties seemed satisfied with the 800 MW if we were to consider increasing it upon completion of the third AC project. BPA will reassess the 800 MW limit upon commercial operation or termination of the project.

Exhibit B Allocations. As for the limits on types of transactions, BPA is convinced of the wisdom of imposing limitations on firm power sales. These limits are shown in Exhibit B of the LTIAP. From the standpoints of environmental quality and financial risks, it seems appropriate to limit Assured Delivery capacity to the amount of firm surplus presently available in the Northwest for export sales. In a change from the 1987 draft policy, the

LTIAP provides that Scheduling Utilities may use their individual Exhibit B amounts for sales or exchanges.

The final LTIAP does not allocate the remaining 356 MW of Assured Delivery capacity among Scheduling Utilities. That amount will be available for exchange transactions of Scheduling Utilities on a first-come, first-served basis.

We have reached agreement (or agreement in principle) covering 341 MW of Assured Delivery service. Agreements include a 20-year 105 MW firm power sale from Montana Power Company to Los Angeles Department of Water and Power; a 41 MW firm power sale from Tacoma City Light to Western Area Power Administration (WAPA); a 45 MW firm power sale from Longview Fibre/Cowlitz County Public Utility District to WAPA; and a 20-year 150 MW seasonal exchange between The Washington Water Power Company and Pacific Gas and Electric Company. Each of these agreements accommodates our lost revenue concerns differently.

To allow for maximum use of the Intertie, a utility granted Assured Delivery may shape its firm power sale into the months of September through December by delivering up to 1.8 times its Exhibit B amount. During those fall months, spot market energy sales to the Southwest tend to be less than in the spring when the region's hydroelectric dams are more often near or in a spilling condition. If a utility shapes Assured Delivery energy into the fall, less firm energy may be shaped into remaining months of the operating year so that the total energy delivered does not exceed its annual Exhibit B energy maximum for firm sales.

BPA will also continue to work with Nonscheduling Utilities to provide the opportunity to sell the output of their generating resources over BPA's Intertie capacity.

Mitigation. Mitigation refers to conditions imposed on a utility for an Assured Delivery contract. Intertie Capacity not available to BPA because of Assured Delivery contracts executed between a Northwest utility and a Southwest utility can reduce BPA revenues and inhibit BPA's ability to make its Treasury payments. During the operating year BPA often has power available to fully load the Intertie. Assured Delivery granted under these circumstances would reduce BPA's revenues, thereby putting at risk our ability to meet our obligations to the Treasury.

This fiscal concern is in potential conflict with the policy objective underlying the 800 MW of Assured Delivery — assisting Northwest utilities in disposing of their surpluses by means of long-term firm power sales to the Southwest. Strong objection was received from our Priority Firm Power customers to our absorbing the entire cost (lost revenues) of these transactions and the subsequent passing of the costs to them in increased rates. California and Northwest generating utilities generally tend to agree that some form of mitigation is due BPA. They question the level of compensation and what provisions for mitigation should be included in the LTIAP.

The 1986 draft of the LTIAP allowed Assured Delivery without regard to the adverse impacts on BPA's ability to sell firm power or nonfirm energy. Both the 1987 draft and the LTIAP impose mitigation upon utilities with Assured Delivery contracts. The mitigation provisions in the LTIAP provide only partial compensation for the revenue impacts resulting from transactions, but provide

sufficient assurance that these transactions over the Intertie will not harm our revenue recovery.

It would be a false precision to claim that we could develop mitigation measures that offset dollar-for-dollar the losses projected in any 20-year study. Assumptions about annual rainfall, gas prices, aluminum prices, and load growth make this exercise judgmental. With this limitation in mind, the LTIAP incorporates the following mitigation provisions.

One mitigation measure requires that during any hour in which prescheduled energy sales are made under Condition 1 and Condition 2 Formula Allocation procedures, a utility must deduct its Assured Delivery amount from its Formula Allocation amount. The total amount of Intertie access granted to each utility is equal to its Formula Allocation. If a utility's Assured Delivery amount is greater than its Formula Allocation, then that utility must purchase enough energy from BPA or, during Condition 1, other Northwest utilities to make up the difference. This mitigation measure will partially offset the spot-market revenues BPA will lose by granting Assured Delivery.

Under the other mitigation measure, if BPA has invoked Condition 1 or Condition 2 Formula Allocations, cash out provisions of exchange contracts become inoperative. Cash outs allow a Northwest utility to accept dollar payments from a Southwest utility in lieu of actual energy returns. Prohibiting these during Conditions 1 and 2 has the effect of increasing the north-to-south capability of the Intertie when energy is being returned and increasing the size of the market for BPA and Scheduling Utility sales.

The draft LTIAP required energy returns under seasonal exchanges to the California/Oregon border (COB) or the Nevada/Oregon border (NOB). This was initially included in the mitigation provisions for seasonal exchanges. However, BPA needs the certainty of available capacity resulting from return requirements at COB/NOB. For this reason, the final LTIAP includes this provision as a standard requirement for all exchanges rather than considering it a mitigation measure.

The LTIAP also allows utilities the opportunity to negotiate individual packages of mitigation in addition to the LTIAP's stated mitigation provisions. Such case-by-case mitigation packages could be a combination of the above mitigation provisions or could include beneficial arrangements for BPA that have not been addressed in this policy. Our main concern in any mitigation package is recovery of any spot-market revenue losses, but we will also be looking at the operational impacts of any proposal.

Extraregional Access. Provisions in the 1987 draft for firm transactions by extraregional utilities required that the utility must provide some benefit to BPA, such as increased storage, improved system coordination or operation, or other consideration of value. In addition, the utility must agree to the mitigation provisions of the policy. Canadian utilities were required to wait for access until after the Intertie was rated at 7900 MW.

In reconsidering this provision we saw no reason for denying Canadian utilities access for firm transactions until after the Intertie is upgraded to 7900 MW if Canadian utilities are willing to provide increased coordination or other items of value. This provision of limiting Canadian access to after an upgrade of the Intertie has been deleted from the LTIAP.

As with Formula Allocation, BPA anticipates that if the Free Trade Agreement is passed the distinction between U.S. extraregional utilities and Canadian utilities will no longer exist.

FISH AND WILDLIFE PROTECTION

Protected Areas. The LTIAP prohibits Intertie access for new hydro projects licensed within "protected areas" — river reaches withdrawn from hydro development due to the presence of wildlife or anadromous and high-value resident fish. BPA also has designated areas where we have determined that investments in habitat, hatchery, passage, or other projects may result in the presence of anadromous fish. The Northwest Power Planning Council (Council) has proposed a protected area program that covers the entire Northwest. BPA's designations, however, cover only the Columbia River basin.

Our focus is on hydro developments which will frustrate our investments made in the region to achieve the goals of the Council's Fish and Wildlife Program. The LTIAP ensures that those expenditures and existing productive habitat will not be harmed by future hydro developments. BPA has designated protected areas by using information collected through the Council's Hydro Assessment Study.

Under the LTIAP, we will consider the Council's final protected area program or any revisions the Council may include in the future. We will also consider appropriate state comprehensive river plans. The policy should effectively eliminate utilities' fears that they never know with certainty whether a hydro resource will qualify, or continue to qualify, for access to the Intertie.

The LTIAP does not necessarily prevent hydro development in protected areas. However, the protected area provisions will send an unambiguous, self-enforcing message to FERC, other regulators, and hydro developers that no Intertie access will be provided for projects constructed in areas of greatest concern to BPA and the Council.

Enforcement. If a Scheduling Utility proceeds to acquire a license or purchase power from a hydro project developed in a protected area, BPA will reduce the amount of that utility's power transmitted over the Intertie during Condition 1. Depending upon the size of the project, the reduction may affect both Assured Delivery and Formula Allocations. These reductions will take place regardless of whether power from the protected area project is actually transmitted on the Intertie. There is no need to trace power flows from a protected area resource.

Projects not affected by the Policy. For all hydro projects not affected by BPA's protected area designations, BPA will intervene in FERC proceedings if we determine that projects — new or existing, inside or outside the Columbia Basin — pose significant threats to our fish and wildlife responsibilities.

The provisions do not affect hydro projects licensed before the effective date of the policy. While we recognize a potential for existing projects to harm BPA fish and wildlife investments, we do not believe there is sufficient evidence to indicate that those projects are presently operating contrary to the Council's Fish and Wildlife Program or that the Council has been unable or unwilling to implement Program measures through the FERC process. Measures affecting existing projects in the Council's Program are explicitly directed to FERC and state agencies for implementation.

We have provided a limited procedure to provide access to the Intertie in the case of a project a developer believes will contribute to the Council's Fish and Wildlife Program and BPA investments. However, our decision to provide access relies on a clear demonstration of the benefits and a regional consensus.

Finally, the LTIAP creates a limited exception for Protected Area projects that an investor-owned utility might be forced to acquire under PURPA. To qualify, however, the affected utility must pursue all legal remedies available to avoid purchasing the Protected Area project output.

LONG-TERM INTERTIE ACCESS POLICY

GOVERNING TRANSACTIONS OVER FEDERALLY OWNED PORTIONS OF THE PACIFIC NORTHWEST-PACIFIC SOUTHWEST INTERTIE

U.S. DEPARTMENT OF ENERGY
BONNEVILLE POWER ADMINISTRATION
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FINAL LONG-TERM INTERTIE ACCESS POLICY

Section 1. *Definitions*

1. "Administrator" means the Administrator of Bonneville Power Administration (BPA) and is used interchangeably with BPA.

2. "Administrator's Power Marketing Program" refers to all marketing actions taken and policies developed to fulfill BPA's statutory obligations. These actions and policies are based on exercises of authority to act, consistent with sound business principles, to recover revenue adequate to amortize investments in the Federal Columbia River power and transmission systems, while encouraging diversified use of electric power at the lowest practical rates. In the Northwest, the Administrator's Power Marketing Program covers BPA's obligations to provide an adequate, reliable, economical, efficient, and environmentally acceptable power supply, while preserving public preference to Federal power. In the Southwest, the Administrator's Power Marketing Program covers activities to market surplus Federal power at equitable prices, while preserving regional and public preference to Federal power, and to assist in marketing Northwest nonfederal power.

3. "Allocation" means the share of the Intertie Capacity made available for short-term sales of energy.

4. "Assured Delivery" means firm transmission service provided by BPA under a transmission contract to wheel power covered by a contract between a Scheduling Utility and a Southwest utility. Assured Delivery contracts may not exceed 20 years in duration. The service is interruptible only in the event of an uncontrollable force or a determination made pursuant to sections 7 or 8 of this policy.

5. "Available Intertie Capacity" is defined as the physically available capacity controlled by BPA, reduced by the capacity reserved under Section 2 of this policy, and the capacity necessary to satisfy Assured Delivery contracts not subject to operational mitigation requirements under this policy.

6. "BPA Resources" means Federal Columbia River Power System hydroelectric projects; resources acquired by BPA under long-term contracts; and resources acquired pursuant to section 11(b)(6)(i) of the Federal Columbia River Transmission System Act.

7. "Exchange" refers to various types of transactions that take advantage of diversity between Northwest and Southwest loads through deliveries of firm power, at prespecified delivery rates, from North to South during the Southwest's peak demands and returns of capacity and/or energy from South to North during other times. Transactions vary depending on the lag between deliveries and returns. A "naked capacity" transaction might require off-peak energy returns within 24 hours, whereas a seasonal exchange might call for firm power returns within 6 months.

8. "Extraregional Utilities" are generating utilities, or divisions thereof, that do not provide retail electric service and do not own or operate significant amounts of generating capacity in the Northwest.

9. "Formula Allocation" means the process by which Intertie Capacity made available for short-term sales of energy.

10. "Intertie" means the two 500-kv alternating current (AC) transmission lines and one 1000 kv direct current (DC) line, which extend from Oregon into California or Nevada, and any additions thereto identified by

BPA as Pacific Northwest-Pacific Southwest Intertie facilities.

11. "Intertie Capacity" means the North to South transmission capacity of the Intertie controlled by BPA through ownership or contract; increased by power scheduled South and North, decreased by loop flow, outages, and other factors that reduce transmission capacity; and further decreased by Pacific Power & Light Company's schedules, under its scheduling rights at the Malin substation (BPA Contract Nos. DE-MS79-86BP92299 and DE-MS79-79BP90091).

12. "Mitigation" refers to the requirements imposed by BPA on a utility in return for an Assured Delivery contract. Mitigation helps offset operational and economic problems, attributable to a Scheduling Utility's firm power transaction, that inhibit BPA's ability to generate revenues. The Mitigation measures specified in this policy must be included in all Assured Delivery contracts, unless a scheduling utility either agrees to a specially designed charge or negotiates substitute measures with BPA on a case-by-case basis.

13. "Nonscheduling Utility" means a nonfederal Northwest utility that owns a Qualified Northwest Resource, but does not operate a generation control area within the Pacific Northwest. A Nonscheduling Utility requesting Intertie access for its resource must do so through the Scheduling utility (or BPA) in whose control area the resource is located.

14. "Pacific Northwest" (or Northwest") is defined in the Northwest Power Act, 16 U.S.C. § 839e, as the states of Oregon, Washington, and Idaho; the portion of Montana west of the Continental Divide; portions of Nevada, Utah, and Wyoming within the Columbia River drainage

basin; and any contiguous service territories of rural electric cooperatives serving inside and outside the Pacific Northwest, not more than 75 air miles from the areas referred to above, that were served by BPA as of December 1, 1980.

15. "Protected Area" means a stream reach within the Columbia River drainage basin specially protected from hydroelectric development because of the presence of anadromous or high value resident fish, or wildlife. Protected areas may also include stream reaches which could support anadromous fish if investments were made in habitat, hatcheries, passage, or other projects.

16. "Qualified Extraregional Resource" means:

(a) a generating unit located outside the Northwest that was in commercial operation on the effective date of this policy. However, the term excludes portions of units covered as Qualified Northwest Resources.

(b) after BPA has determined that the capacity of the Interties is rated at approximately 7,900 MW, all resources located outside of the Northwest, other than the portions of extraregional resources covered as Qualified Northwest Resources.

17. "Qualified Northwest Resource" excludes BPA Resources, but includes:

(a) Resources located inside the Northwest that are in commercial operation as of the effective date of this policy.

(b) Scheduling Utility extraregional generating resources dedicated to Northwest loads on the effective date of this policy. This term includes pro rata portions of Montana Power Company's and Pacific Power and Light Company's shares of the Colstrip No. 4 generating sta-

tion, based on the ratio of their respective regional loads to their respective total loads; and idaho Power Company's share of Valmy No. 2.

(c) New regional resources of Scheduling utilities, except for hydroelectric resources located in Protected Areas.

18. "Resource" means an electric generating unit or stack of particular electric generating units identified to supply power or capacity for sale over the Intertie.

19. "Scheduling Utility" means the Northwest portion of a nonfederal utility that operates a generation control area within the Northwest, or any utility designated as a BPA "computed requirements customer." The term excludes Utah Power & Light Company, either as a separately owned company or as a division of another corporation, which has sufficient transmission capacity to the Southwest without access to the Federal Intertie.

20. "Seasonal Exchange" means a transaction that takes advantage of seasonal diversity between Northwest and Southwest loads through transfers of firm power, at a prespecified delivery rate, from North to South during the Southwest's summer load season and from South to North during the Northwest's winter load season. Seasonal Exchanges may involve payments of additional consideration to reflect the relative seasonal values of power throughout the western United States. Seasonal Exchange schedules of Northwest utilities will be referred to as "deliveries," and schedules of Southwest utilities will be referenced as "returns." A Scheduling Utility must be able to support its summertime firm power deliveries with generating resources that are surplus to its Northwest requirements. The sum of a Scheduling utility's energy resources for each month in which deliv-

eries are made (with special concern for August) must exceed its corresponding Northwest loads by an amount sufficient to support the Seasonal Exchange.

21. "Section 9(i)(3) resource" means a Scheduling Utility resource that BPA has granted priority in receiving BPA transmission, storage and load factoring services as defined in § 9(i)(3) of the Northwest Power Act.

Section 2. *Intertie Capacity Reserved for BPA*

The Administrator reserves for BPA's use Intertie Capacity sufficient to:

(a) transmit all of BPA's surplus firm power and to serve other obligations,

(b) perform obligations, including, but not limited to, the existing transmission contracts listed in Exhibit C, to the extent such obligations differ from the conditions specified in this policy,

(c) provide Assured Delivery service for transactions not subject to limits under Exhibit B to this policy, and

(d) satisfy BPA firm obligations, that have not been prescheduled, by using unutilized portions of Formula Allocation amounts.

Section 3. *Conditions For Intertie Access*

(a) All Intertie access will be granted pursuant to the conditions and procedures of this policy, unless otherwise specified in the three existing BPA transmission contracts listed in Exhibit A.

(b) BPA will provide Intertie access only for BPA Resources and the Qualified Northwest Resources of Scheduling Utilities, except to the extent that Qualified

Extraregional Resources are permitted access under this policy.

(c) BPA will provide Assured Delivery and allocate remaining Intertie Capacity when providing such access will not substantially interfere with operating limitations of the Federal system. Examples of these limitations, which reflect BPA's obligation to operate in an economical and reliable manner consistent with prudent utility practices, include:

(1) The BPA Reliability Criteria and Standards,

(2) Western Systems Coordinating Council minimum operating reliability criteria,

(3) North American Electric Reliability Council Operating Committee minimum criteria for operating reliability, and

(4) coordinating agreements among BPA, scheduling utilities and other Federal agencies regarding resource and river operations.

(d) Any utility that has contractual or ownership rights to Pacific Northwest-Pacific Southwest Intertie capacity or to other transmission lines to California or the Southwest market must fully utilize such capacity prior to receiving any access to BPA's Intertie Capacity. If a Scheduling Utility with Intertie rights needs BPA Intertie Capacity to reach a particular Southwest utility, BPA will consider negotiated swaps of capacity to accommodate such requests.

Section 4. *Assured Delivery for Intertie Access*

Subject to the limitations and other conditions in this section and in other sections of this policy, BPA has determined that it can provide limited Assured Delivery to Scheduling Utilities without causing substantial inter-

ference with the Administrator's Power Marketing Program.

(a) *General Provisions*

(1) *Existing Transmission Contracts.* BPA will provide Assured Delivery for the remaining terms of the firm power sale and Seasonal Exchange contracts identified in Exhibit C to this policy.

(2) *Utilities Owning Or Controlling Southwest Interconnections.* Assured Delivery is intended primarily for Scheduling Utilities which lack interconnections with the Southwest. Except for transactions covered by section 4(b) of this policy, a utility with capacity on an intertie, through contract or ownership, must utilize all such capacity on a firm basis before receiving any Assured Delivery.

(3) *Nature Of Transactions.* BPA will not provide Assured Delivery for transactions which a Scheduling Utility cannot demonstrate to be other than an advance arrangement to sell nonfirm energy.

(4) *Waiver of BPA Service Obligation.*

(A) *Hydroelectric Resources.* Assured Delivery contracts that facilitate the export disposition of Northwest hydroelectric energy shall provide, under 16 U.S.C. § 837b(d), for a reduction of BPA's power sale contract obligation the Northwest utility, for the period of the disposition, equal to the amount of energy for which Assured Delivery is provided.

(B) *Thermal Resources.* Assured Delivery contracts that facilitate the export disposition of Northwest thermal energy shall provide, under 16 U.S.C. § 839f(c), for a reduction of BPA's power sale contract obligation the Northwest utility, for the period of the disposition, equal

to the amount of energy for which Assured Delivery is provided. Such reduction shall become effective at the time BPA determines that it has reached energy load/resource balance, or at a date as specified in the Assured Delivery contract.

(5) *Exchange Contracts.* Exchange contracts must specify that all return energy be scheduled to either the AC Intertie point of interconnection at the California-Oregon border ("COB") or the DC Intertie point of interconnection at the Nevada-Oregon border ("NOB"). Exchange contracts must also specify prescheduled determinations of hourly energy returns.

(6) *Satisfying Requests For Assured Delivery.* All relevant power contracts must be presented for review no later than the date on which a request for Assured Delivery is made.

(b) *New Transactions Not Subject To Capacity Limits*

(1) *Joint Ventures.* Joint ventures between BPA and utilities, such as firm displacement contracts, which allow BPA to increase its sales of surplus power qualify for Assured Delivery.

(2) *Sales in Lieu Of Exchanges.* BPA may offer to satisfy Scheduling Utility demands for Seasonal Exchanges by selling them incremental amounts of surplus firm power during winter months. Upon committing to purchase such incremental firm power at negotiated prices that reflect BPA's lost opportunities for summer sales, a Scheduling Utility will qualify for Assured Delivery (with mitigation) to wheel an equal amount of firm capacity and energy over the Intertie during summer months.

(3) *Conditions.* A scheduling utility may request at any time the Assured Delivery of transactions identified

in sections 4(b)(1) and 4(b)(2). Relevant contracts must be presented for review when Assured Delivery is requested. BPA will satisfy a request within 60 days after a Scheduling Utility has demonstrated satisfaction of the requirements of this policy.

(c) *Transactions Subject to Capacity Limits Under This Policy*

(1) *Maximum Amounts Of Assured Delivery.* BPA will provide 800 MW of Assured Delivery for firm power sales and Exchanges identified in this policy. BPA will reassess the amount of Assured Delivery capacity when the 3d AC Intertie project is either completed or abandoned. Moreover, the 800 MW amount may be subject to some reduction if the DC Terminal Expansion project is not completed on schedule.

(2) *Exhibit B amounts.*

(A) *Current maximum.* Each Scheduling Utility's maximum Assured Delivery amount for firm sales equals its average firm energy surplus, shown in Exhibit B to this policy. BPA will reserve capacity equal to each Scheduling utility's Exhibit B allocation subject to section 4(c)(2)(D) below. Except for Montana Power Company (MPC), Tacoma City Light, and Cowlitz County Public Utility District, Exhibit B represents projected Scheduling Utility surpluses for the 1988-89 operating year. In satisfaction of all obligations to MPC under Northwest Power Act section 9(i)(3), MPC's Exhibit B amount is set at 105 MW to facilitate long-term sales of firm power from its share of the Colstrip No. 4 coal-fired generating station. Exhibit B amounts for Tacoma and Cowlitz are increased to accommodate existing firm power transactions.

(B) *Shaping.* Firm power sales eligible for Assured Delivery may be shaped within the following ranges. During the months of September through December, a Scheduling utility may deliver firm energy at a rate up to 1.8 times its Exhibit B average firm surplus amount. During the months of January through August, a Scheduling Utility may deliver firm energy at a rate no greater than 1.0 times its Exhibit B amount. However, total delivered energy may not exceed the Exhibit B annual firm energy maximum.

(C) *Other uses of Exhibit B amounts.* BPA will not entertain Assured Delivery requests for firm power sales in excess of a utility's Exhibit B maximum. However, a Scheduling Utility may use any portion of its Exhibit B maximum, not used for firm power sales, for exchange transactions supported by Qualified Northwest Resources.

(D) *Future changes.* BPA may, at its discretion, revise Exhibit B to reflect changes in the firm power surpluses of individual utilities; however, the Exhibit B average firm surplus total is not subject to increase. Any unutilized Assured Delivery amount will be revoked if, upon revision, a utility's individual Exhibit B amount has declined or if a utility has sold firm power to another utility seeking to increase its Exhibit B average firm surplus amount. A Scheduling utility may increase its individual Exhibit B amount by purchasing surplus firm power from BPA or any Scheduling Utility with an Exhibit B amount.

(3) *Other Capacity.* The remaining capacity available for Assured Delivery under this policy is offered to Scheduling Utilities, on a first-come, first-served basis, for Exchange transactions supported by Qualified Northwest Resources. When section 4(c)(2)(D) of this policy

is implemented to reduce the Exhibit B maximum of any Scheduling Utility, the reduction will be added to the capacity made available under this provision. Any utility with an Exhibit B amount must exhaust such capacity before requesting Assured Delivery under this provision.

(d) *Mitigation*

(1) *Operational Mitigation*

(A) *Southbound deliveries.* During any hour in which BPA has invoked Condition 1 or Condition 2 allocation procedures to preschedule energy deliveries, each utility's Assured Delivery amount shall be deducted from its formula allocation to determine its share of energy scheduled on the Intertie. If the remainder is negative for a given utility, then that utility must make up the difference by purchasing sufficient energy as follows:

(i) during Condition 1 from BPA or any Scheduling Utility with a Formula Allocation during that hour;

(ii) during Condition 2 from BPA, however, if BPA is not in the market the utility may purchase sufficient energy from any other utility.

(B) *Northbound returns.* During any hour in which BPA has invoked Condition 1 or Condition 2 allocation procedures, a utility may utilize the cash-out provisions of an Exchange contract only by reducing one-for-one the amount of North-to-South Intertie capacity otherwise available to it under this policy. The rate of cash out during any condition shall not exceed the rate at which the exchange return could have been scheduled.

(2) *Negotiated mitigation.* A Scheduling Utility may also elect to negotiate with BPA on a case-by-case basis a package of mitigation measures involving mutually agree-

able consideration of value commensurate with the service provided.

Section 5 *Formula Allocation*

(a) *Limits On Intertie Capacity Available For Formula Allocation.* Generally, BPA will determine Intertie Capacity available for Formula Allocations after first taking into account the amount of Intertie Capacity necessary to satisfy requirements of the Administrator's Power Marketing Program, existing transmission contracts listed in Exhibit C, and Assured Delivery contracts executed by BPA pursuant to this policy. However, in determining Available Intertie Capacity during Condition 1, BPA will not consider the Assured Delivery contracts to the extent they are subject to operational mitigation requirements. BPA may reduce any allocation, if additional Intertie Capacity is required to minimize revenue losses associated with actions taken to protect fish in the Columbia River drainage basin.

(b) *Protected Area Decrements.* Except as provided in section 4(d)(2)(A) of this policy, BPA will reduce each Scheduling Utility's allocation by any Protected Area decrement imposed pursuant to section 7(d).

(c) *Allocation Methods.*

(1) *Condition 1*

(A) *Until December 31, 1988.* Intertie Capacity will be allocated pursuant to the Exportable Agreement (BPA Contract No. 14-03-73155), when applicable.

(B) *After December 31, 1988.* Condition 1 will be in effect when the Federal hydro system is in spill or there is a likelihood of spill, as determined by BPA. Available

Intertie capacity will be allocated pursuant to the following procedure:

(i) Each hour, the maximum Condition 1 allocations for BPA and each Scheduling Utility will be based on the ratio of their respective declarations to total declarations, multiplied by the Available Intertie Capacity.

(ii) During Condition 1, whenever BPA is unable to utilize its full pro rata share of intertie usage BPA will take larger allocations on ensuing days until the difference in pro rata intertie usage is eliminated.

(2) *Condition 2*

(A) When Condition 1 is not in effect, but BPA and Scheduling Utilities declare amounts of energy that exceed available Intertie capacity, Formula Allocations for BPA and each Scheduling Utility will approximate, by hour, the ratio of each declaration to the sum of all declarations, multiplied by the available Intertie capacity.

(B) If BPA sales drop below 75 percent of its allocation during Condition 2, BPA may take larger allocations on ensuing days until the difference is eliminated.

(3) *Condition 3*

When Condition 1 is not in effect and when the total surplus energy declared available by BPA and Scheduling Utilities is less than the total available Intertie Capacity, BPA and Scheduling Utilities' allocations will equal their declarations. The remaining Intertie capacity will be made available first to U.S. Extraregional Utilities and then to other Extraregional Utilities. Section 3(d) of this policy shall not apply to Scheduling Utilities during Condition 3.

(d) *Formula Allocation Experiment.* BPA is interested in exploring the proposal that it cease making individual Formula Allocations to Scheduling Utilities under Conditions 2 and 3. However, BPA must work with Northwest and Southwest utilities to develop the information capability to accommodate a new scheduling system for nonfederal access. As soon as this can be accomplished BPA will substitute the following provisions for section 5(c) on an 18-month experimental basis:

(1) *Condition 1*

Same as section 5(c)(1).

(2) *Condition 2*

(A) When Condition 1 is not in effect, but BPA and Scheduling Utilities declare amounts of energy that exceed available Intertie capacity, the Formula Allocation for BPA will approximate, by hour, the ratio of BPA's declaration to the sum of all declarations, multiplied by the Available Intertie Capacity. The remaining capacity will be made available as a block to Scheduling Utilities. Section 5(c)(2)(B) of this policy shall apply.

(3) *Condition 3*

When Condition 1 is not in effect and when the total surplus energy declared available by BPA and Scheduling Utilities is less than the total available Intertie Capacity, BPA's allocation will equal its declaration. The remaining Intertie capacity will be made available, first, as a block to satisfy the declarations of Scheduling Utilities, second, to U.S. Extraregional Utilities, and third to other Extraregional Utilities. Section 3(d) of this policy shall not apply during Condition 3.

(e) *Data Collection and Evaluation.* Commencing when this policy goes into effect and continuing during

the course of the experiment described in section 5(d), BPA will collect information on the following topics relevant to future allocation procedures:

(1) effect on BPA revenue of allocating to nonfederal utilities as a group rather than individually,

(2) impairment of Intertie access for California utilities presently lacking ownership in the southern portion of the Intertie,

(3) any loss of sales to BPA due to a failure to share unused capacity among California entities with ownership or contractual interests in the Intertie,

(4) effects of the experiment on small Scheduling Utilities.

During the course of the experiment, interested parties may submit written comments and recommendations on these issues.

(f) *Findings and conclusions.* At least 30 days before the end of the experiment described in section 5(d), BPA shall publish a report of its findings on the experiment and its decision on whether section 5(d), with possible modification, should be continued as the permanent method of Formula Allocation.

Section 6. *Access for Qualified Extraregional Resources*

(a) *Assured Delivery.* Any request for Assured Delivery of power from a Qualified Extraregional Resource would be granted only by contract which, in addition to the Mitigation measures specified in section 4(d), must include benefits to BPA such as increased storage, improved system coordination or operation, or other consideration of value commensurate with the services provided. Proposed contracts would be evaluated by BPA and reviewed publicly to determine whether they would cause

substantial interference with the Administrator's Power Marketing Program. An environmental review would also be conducted.

(b) *Formula Allocation.* Under Condition 3, energy from Qualified Extraregional Resources has access to the Intertie. In addition, BPA may provide Extraregional Utilities with Formula Allocation under other conditions, if the utility agrees by contract either to increased participation in the Pacific Northwest's coordinated planning and operation, or to provide other consideration of value, apart from the standard BPA wheeling rate, commensurate with the services provided.

Section 7. *Fish and Wildlife Protection*

(a) *Purpose.* New hydroelectric projects constructed in Protected Areas may substantially decrease the effectiveness of, or substantially increase the need for, expenditures and other actions by BPA, under Northwest Power Act section 4(h), to protect, mitigate or enhance fish and wildlife resources. Intertie access will not be provided to facilitate the transmission of power generated by any new hydroelectric projects located in Protected Areas and licensed after the effective date of this policy. This provision does not apply to added capacity at existing projects.

(b) *Effect.* This section imposes automatic operational limitations on a utility by reducing the amount of energy that can be scheduled over the Intertie, thereby increasing costs or reducing revenues for any utility owning or acquiring the output of a Protected Area hydroelectric resource.

(c) *Implementation.* Protected Area designations for stream reaches in the Columbia River Basin are shown in Exhibit C to this policy. Exhibit C uses Environmental Protection Agency stream reach codes. Subject to review

and possible modification, BPA will consider the adoption of comprehensive state watershed management plans and a comprehensive protected area program developed by the Pacific Northwest Electric Power and Conservation Planning Council subsequent to implementation of this policy. BPA will also consider revisions to Protected Area designations if the Council's Program is amended.

(d) *Enforcement.* If a Scheduling Utility or Nonscheduling Utility owns, or acquires the output from, a hydroelectric project covered under the restrictions of section 7(a), BPA will reduce that utility's Formula Allocation by either the nameplate rating of the project (in the case of ownership), or the amount of capacity acquired by contract.

(e) *Exceptions.*

(1) *PURPA Projects.* BPA will entertain requests that it not enforce the provisions of section 7 in situations where an investor-owned utility has been compelled to acquire the output of a Protected Area hydroelectric resource under section 210 of the Public Utilities Regulatory Policies Act (PURPA). To qualify for this exception, the investor-owned utility must demonstrate:

(A) that it has exercised all opportunities available under federal and state laws and regulations to decline to acquire the output of the Protected Area resource in question;

(B) that it has petitioned its state regulatory authority(ies) to reduce the rate(s) established under PURPA for purchases from Protected Area resources in recognition of the increased costs or reduced revenues caused by operation of section 7(c) of this policy;

(C) that BPA was provided reasonable notice of all relevant regulatory and judicial proceedings to allow for timely intervention in such proceedings; and

(D) after taking all of the foregoing steps and exhausting all reasonable opportunities for judicial review, that it was compelled to acquire the output of a Protected Area hydroelectric resource by final order of FERC or a state regulatory authority issued under PURPA.

(2) *Projects Contributing to Council's Fish and Wildlife Program or BPA Investments.* Access will be automatically denied for projects developed in protected areas unless BPA receives sufficient demonstration that a particular project will provide benefits to existing or planned BPA fish and wildlife investments or the Council's Program. BPA's determination will be based on:

(A) Information provided by the project developer, Federal and state fish and wildlife agencies, and tribes; or

(B) action by the Pacific Northwest Power Planning Council.

Section 8. *Other Enforcement Provisions*

(a) Whenever the terms of this policy are not being met, BPA will inform the appropriate utility of the nature of the noncompliance and actions that may be taken to achieve compliance. If noncompliance is not corrected within a reasonable period, BPA may deny access for a resource and refuse to accept schedules.

(b) Upon approval of the proposed U.S.-Canada Free Trade Agreement by the Canadian Parliament and the United States Congress, any and all distinctions made in this policy between Canadian and United States Extraregional Utilities shall terminate on the effective date of the Agreement.

EXHIBIT A
EXISTING AGREEMENTS FOR INTERTIE CAPACITY

This is a list of existing BPA transmission contracts that were signed before the implementation of the NTIAP and will continue to receive Intertie access under the LTIAP.

Utility	BPA Contract No.	
Washington Water Power Company	DE-MS79-81BP90185	07/01/91
Washington Water Power Company	14-03-791101	09/01/88
Western Area Power Administration	DE-MS79-84BP91627	10/31/90

EXHIBIT B
INTERTIE CAPACITY AVAILABLE FOR ASSURED DELIVERY

BPA has reserved 800 MW of Intertie capacity to be available for nonfederal firm transactions. This capacity is allocated as follows:

A. *Average Firm Surplus Allocations:*

Utility	Average MW Firm Surplus
Chelan County PUD #1	10
Cowlitz County PUD #1	45(1)
Douglas County PUD #1	0(2)
Eugene Water and Electric Board	14
Grant County PUD #1	26
Seattle City Light	23
Snohomish County PUD #1	0
Tacoma City Light	41(3)
Idaho Power Company	87
Montana Power Company	105(4)
Puget Sound Power and Light	0
Washington Water Power	93
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NOTE: The Average Firm Surplus (AFS) is directly from the PNUCC Northwest Regional Forecast of March 1987 for the period 1988-89 except as noted below. It includes resources operational on the effective date of this policy. Export contracts are included as loads. Utilities may use their AFS allocations for long term firm sales or for exchanges. Portland General Electric Company and Pacific Power & Light Company are not eligible for an AFS allocation because of their existing interconnections with the Southwest.

(1) Cowlitz Co. PUD's AFS is the amount of their existing export of the Longview Fibre resource. Longview Fibre is considered to be a Federal resource in the Northwest Regional Forecast and is not included under Cowlitz.

(2) Douglas County PUD's AFS is 2; but Douglas has previously requested to show zero.

(3) The amount displayed for Tacoma is the amount of their existing exports displayed in the Northwest Regional Forecast.

(4) Montana Power Company's AFS was increased from 80 MW to 105 MW in settlement of obligations under Northwest Power Act section 9(i)(3).

B. *Intertie Capacity Available for Seasonal Exchanges:* The above allocations for sales of firm surplus may be used for exchanges. The remaining 356 MW of capacity is available on a first come-first serve basis for exchanges only under the terms of the LTIAP. If there is a decrease in a utility's firm surplus and the utility does not have a contract for that amount, BPA will allocate the difference to capacity available for exchanges by revising this Exhibit B.

EXHIBIT C
PROTECTED AREAS

Exhibit C corresponds to the Northwest Power Planning Council protected area designations within the Columbia Basin, as specified in the Columbia River Basin Fish and Wildlife Program. Stream reaches designated as protected areas are identified by Environmental Protection Agency stream reach codes. Information about designations are contained on hard copy computer printouts or computer diskette copies which are available to the public upon request.

ADMINISTRATOR'S DECISION
LONG-TERM INTERTIE ACCESS POLICY

U.S. DEPARTMENT OF ENERGY
BONNEVILLE POWER ADMINISTRATION
MAY 17, 1988

ADMINISTRATOR'S DECISION

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APPENDIX

Side-by-side comparison of LTIAP and the "1987 draft policy" of December 15, 1987

Abbreviations Used in Decision

LIST OF COMMENTERS

Anglers	Southwest Washington Anglers
APAC	Association of Public Agency Customers
Basin	Basin Electric Power Coop
BC Hydro	British Columbia Hydro and Power Authority
Benton Coop	Benton Rural Electric Assn.
Benton PUD	Benton County PUD #1
Big Bend	Big Bend Electric Coop
BLM	Bureau of Land Management
BPA	Bonneville Power Administration
Canby	Canby Utility Board
CEC	California Energy Commission
Chelan	Chelan County PUD #1
Clark	Clark County PUD
COE	U.S. Army Corps of Engineers
Cowlitz	Cowlitz County PUD
CPUC	California Public Utilities Commission
CRITFC	Columbia River Intertribal Fish Commission
DSI	Direct Service Industries
EWEB	Eugene Water and Electric Board
Ferry	Ferry County PUD #1
Flyfishers	Clark-Skamania Flyfishers
Grant	Grant County PUC #2
Harney	Harney Electric Coop
ICP	InterCompany Pool

IPUC	Idaho Public Utilities Commission
IPC	Idaho Power Company
LADWP	Los Angeles Department of Water and Power
Mason	Mason County PUD #3
Mid-Columbia	Mid-Columbia PUD
MPC	Montana Power Company
NCAC	National Conservation Act Coalition
NCPA	Northern California Power Agency
NGPU	Non-Generating Public Utilities
NIU	Northwest Irrigation Utilities
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NRDC	National Resources Defense Council
NWPPC	Northwest Power Planning Council
OPUC	Oregon Public Utilities Commission
ORECA	Oregon Rural Electric Cooperative Association
PG&E	Pacific Gas & Electric Company
PGE	Portland General Electric Company
PGP	Public Generating Pool
PNGC	Pacific Northwest Generating Company
PNUCC	Pacific Northwest Utilities Conference Committee
Port Angeles	Port Angeles City Light
PP&L	Pacific Power & Light Company
PPC	Public Power Council
PSP&L	Puget Sound Power & Light Company
Ravalli	Ravalli County Electric Coop

SCE	Southern California Edison Company
SCL	Seattle City Light
SDG&E	San Diego Gas & Electric
Sierra	Sierra Club
Skagit	Skagit System Cooperative
SMUD	Sacramento Municipal Utility District
TANC	Transmission Agency of Northern California
TCL	Tacoma City Light
Tillamook	Tillamook County PUD
Umatilla	Umatilla Electric Coop
UP&L	Utah Power & Light Company
Vernon	City of Vernon, CA
Vigilante	Vigilante Electric Coop
WAPA	Western Area Power Administration
Wasco	Northern Wasco County PUD
WPAG	Western Public Agencies Group
WPSC	Wyoming Public Service Commission
WUTC	Washington Utilities and Transportation Commission
WWP	Washington Water Power Company

OTHER ABBREVIATIONS

AC	— alternating current
aMW	— average megawatts
ASC	— Average System Cost
BPA	— Bonneville Power Administration
COTP	— California-Oregon Transmission Project
CT	— combustion turbine

DC	— direct current
DOE	— Department of Energy
DSI	— direct-service industrial customer
EIS	— environmental impact statement
FCRPS	— Federal Columbia River Power System
FERC	— Federal Energy Regulatory Commission
FY	— fiscal year
IAP	— Intertie Access Policy
IDU EIS	— Intertie Development and Use Environmental Impact Statement
IOU	— investor-owned utility
kV	— kilovolt (one thousand volts)
kWh	— kilowatthour (one thousand watthours)
LTIAP	— Long-Term Intertie Access Policy
MW	— megawatt (one thousand kilowatts)
NEPA	— National Environmental Policy Act
NTIAP	— Near-Term Intertie Access Policy
O&M	— operations and maintenance
OY	— operating year
PF	— priority firm power (rate)
PNW	— Pacific Northwest
PURPA	— Public Utility Regulatory Policies Act
WNP	— Washington Public Power Supply System Nuclear Project

This decision on the Long-Term Intertie Access Policy (LTIAP or policy) is divided into five parts. Part One is an Introduction, covering important background information on the Intertie and our access policies. Part Two resolves issues regarding "Formula Allocation" provisions for short-term energy transactions utilizing the

Pacific Northwest-Pacific Southwest Intertie. Part Three analyzes issues on "Assured Delivery" of long-term firm power transactions. Part Four discusses issues related to the IAP's fish and wildlife provisions. Part Five sums up the entire decision by analyzing the effects of the LTIAP on each group interested in the outcome of our decisions on Intertie access.

Issues each are discussed in three steps. First, we explain our proposal in the 1987 draft LTIAP. Second, we summarize the comments received in the public comment process. Third, we discuss the points raised in comments and explain our decision.

The citations to the record of this proceeding are of two forms. Written comments are cited using the form: commenter, record citation, and comment page number. Citations to the transcript appear as "Tr. ____."

PART ONE
INTRODUCTION

Section 1. Operation Of The Intertie

The Facility. Since its completion in 1968, the Intertie has served as the principal means for transmitting surplus capacity and firm power and nonfirm energy between the Pacific Northwest and California. This section briefly describes the Pacific Northwest-Pacific Southwest Intertie and gives a picture of the complex nature of its operation.

Legislation authorizing construction of an Intertie system focuses on two objectives.[1]

First, Congress sought to provide an additional market for BPA power, enabling us to increase revenues and repay the U.S. Treasury in a timely manner. BPA owes the Treasury $8 billion associated with capital investments in the Federal Columbia River power generation and transmission systems. By transmitting surplus power and energy to California, we can obtain additional revenue to repay the Treasury in a timely manner.

Second, the Intertie makes more efficient use of resources in the Northwest and California. When the Northwest has surplus power during summer months, power generally can be sold to California more cheaply than California utilities can operate their thermal generation plants. When the Northwest has "peak" needs in winter for heating and California loads are lower, the Northwest can purchase power from California. Existing resources can be used more efficiently, and both regions can avoid building generation to meet peak loads at some times of the year.

In the Northwest, the Intertie consists of several high-voltage transmission lines — two 500-kilovolt (kV) alter-

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[1]16 U.S.C. § 837 (Northwest Preference Act) (1964). *See also Department of Water and Power v. BPA*, 759 F.2d 684 (9th Cir. 1985)

nating-current (AC) lines, a portion of a third 500-kV AC line, and one 1,000-kV direct-current (DC) line (see Figure 1). The AC lines extend about 945 miles from John Day Substation near John Day Dam on the Columbia River in Oregon to the Lugo Substation near Los Angeles. They interconnect with other transmission lines at eight points. The 846-mile DC line runs from the Celilo Station near The Dalles Dam, Oregon, to the Sylmar Station near Los Angeles. The DC line transmits power between the Northwest and Southern California.

The present physical capability of the Intertie lines is approximately 5,200 MW — about 3,200 MW on the AC lines and 2,000 MW on the DC line. The terminals at both ends of the DC line are currently being upgraded, which will increase the line's capacity by approximately 1,100 MW. There are also plans to increase the capability of the AC lines to approximately 4,800 MW. In the Northwest, the facilities of the AC Intertie are individually and jointly owned by BPA, PGE, and PP&L. BPA owns or controls nearly 80 percent of the Intertie capacity north of the Oregon border. BPA shares its Intertie capacity with nonfederal utilities for both spot-market and long-term transactions.

Discussing the northern portion of the Intertie tells only half the story. California utilities constructed AC and DC lines to meet the lines constructed in the Northwest. Capacity on the southern portion matches that of the northern portion. Four utilities — PG&E, SCE, LADWP, and SDG&E — own approximately 80 percent of the Intertie capacity south of the Oregon border.

The Operation. It is important to distinguish between two distinct levels of operation to understand the complex and integrated nature of the Intertie system.

Existing Intertie System

The first level is the daily operation of the Intertie. The three northern owners and all other utilities using the Intertie must coordinate and cooperate in the operation of the Intertie. The northern portion of the Intertie connects with two other utility service territories. The Intertie can receive and dispatch energy at each of these interconnections for sales over the facility.

In the north, we serve as the central scheduler for transactions and deliveries of energy. In the south, PG&E is the scheduler for the AC line and SCE is the scheduler for the DC line. All utilities who use the Intertie are in close communication with the schedulers. A single spot-market sale requires two utilities to agree in advance on quantity, price, and timing; to arrange with the schedulers in advance of the delivery; and then to deliver and receive the energy at the appointed time. Frequently these scheduled deliveries change on a "real-time" basis due to changes in a utility's system operations. As scheduler for the northern portion of the Intertie, we employ people around the clock to coordinate these activities.

The Intertie serves a variety of markets. Energy may flow in either direction depending on the conditions of supply and demand. Utilities purchase energy both on the spot market for short periods of time and on a long-term basis. Utilities exchange energy on a daily, weekly, monthly, or seasonal basis. For instance, a Southwest utility may receive Northwest energy in the summer to meet its peak cooling load and return it to a Northwest utility in the winter to meet its peak heating load. The Northwest with its large hydroelectric and storage capability is well equipped to meet the peaking capacity requirements of California. With this type of transaction a California utility purchases the right to demand energy

over the Intertie if it needs it. In critically low water years, Northwest utilities can rely on Southwest utilities for similar needs.

The second level of operation is contractual. The existing rights to the Intertie are based on ownership of facilities. On the northern portion, BPA owns the DC Intertie and the majority of facilities in the two AC lines. PGE owns a segment of the existing two-line AC Intertie and has contractual rights to 25 percent of the capacity produced by those two lines. Our agreement with PGE expires this year; BPA and PGE are currently negotiating a replacement agreement.

PP&L and BPA have executed an agreement that provides PP&L a firm right to 300 MW of capacity for delivery to California at the Malin substation. This right will increase if the AC systen is upgraded. We received the right to utilize PP&L's facilities for Intertie deliveries and the right to participate with PP&L in construction of a 500-kV line from Alvey substation to Meridian substation, if we determine that would be the best plan-of-service for increasing capacity in the Northwest to accommodate the California-Oregon Transmission Project for upgrading AC Intertie capability in California. BPA's agreement with PP&L expires in 2016. In addition, we have a number of agreements with PGE and PP&L addressing construction and operation and maintenance of Intertie facilities.

Construction of the third AC line in the Northwest would add another layer of contract and ownership rights to the Intertie system, as would nonfederal participation in the third AC project.

We have agreements with other Northwest utilities for use of BPA's capacity on the Intertie and one agreement

with an extraregional utility, Basin Electric Cooperative in North Dakota. These agreements consist of long-term contracts for wheeling over the Federal portion of the Intertie. Prevalence of this type of contract will increase with adoption of the LTIAP.

Competing Demands. The Intertie is a resource that generates hundreds of millions of dollars per year of revenues and that eliminates the need for new resources, particularly in the Southwest. Generating utilities in the Northwest and California have access for firm and spot-market sales. It is not surprising that these utilities compete for access rights to this limited resource.

If the only demand on Intertie use came from utilities with surplus power to sell, the answers to the issues involved in developing a reasonable access policy might be more clear. However, other groups have placed demands on how and for what purpose the Intertie is used. One group is BPA's full requirements customers, which include nongenerating public utilities and direct-service industrial customers, primarily aluminum smelters. They have consistently demanded a policy that would allow BPA to use the Intertie in such a manner as to maximize BPA revenues from sales of BPA's surplus power.

Environmental groups and fish and wildlife organizations also have stated their preference for how the Intertie should be used. They have focused on implementing a policy which would have no adverse impact on fish and wildlife resources in the Northwest. Environmentalists support a policy which would prevent hydro development on rivers and streams in the Northwest, no matter how economically rewarding for developers.

California utilities seek a policy which provides the maximum amount of Northwest energy at the lowest cost.

They would like to rely on inexpensive, abundant Northwest energy to meet their future load growth by means of either firm purchases or exchanges.

Finally, BPA has demands of its own, based on the objectives specified in the enabling legislation for construction of the Intertie. The LTIAP must be structured tc assist us in repaying the $8 billion Treasury investment in the Federal power and transmission systems. Furthermore, we do not want to encourage hydro development that could jeopardize our $120 million investment in fish and wildlife protection.

Section 2. Evolution Of The Intertie Access Policy

Interim IAP. Before adopting an Intertie access policy, we were often unable to make the sales we wished due to the requirements of the Northwest Regional Preference Act, 16 U.S.C. § 837, *et seq.* Under this law we must announce our price to Northwest utilities prior to selling energy out of the region, which allows those utilities, our competitors, to underbid our price when they make sales to California.

This situation was exacerbated by the restricted market in California, where there are relatively few buyers because ownership of the Intertie is limited. Consequently, insufficient competition has existed on the southern end to balance the downward pressure on prices in the Northwest. As we lost sales, our reservoirs would rise, hastening the time when we would have to implement the Exportable Agreement (including the very low prices which at that time were tied to the Agreement). Although we were assured of sales under the Exportable Agreement, the prices we obtained were much lower than we otherwise would have received.

The unexpected power surplus in the Northwest and Canada that materialized in the early 1980s caused us to review our use of the Federal share of the Intertie. BPA, as well as many of the generating utilities in the Northwest, suddenly had a large firm power surplus. This was also the case for British Columbia Hydro and Power Authority (BC Hydro) and utilities as far away as North Dakota. All were hoping to sell their surplus in the Southwest over available Federal Intertie capacity.

At the same time, BPA finances took a downturn due to (1) costs imposed by the Northwest Power Act for conservation, fish and wildlife, the residential exchange subsidy program, and other Congressional goals; (2) decisions relating to the Washington Public Power Supply System nuclear plants; (3) direct-service industrial customer (DSI) aluminum plant shutdowns and closures; and (4) an economic recession in the Northwest. BPA needed to take fuller advantage of its own transmission lines to market surplus power at fully allocated cost.

We began to develop an Intertie access policy in the summer of 1983 with a public notice and request for comment. The purpose of the policy would be to "guide [BPA's] response to requests from nonfederal parties for use of [our] Intertie capacity, within the context of existing contractual obligations." In early 1984, we published a paper discussing the major issues on Intertie access that had been identified to that point.

In July of 1984, we proposed an Intertim Near-Term Intertie Access Policy (Interim IAP) that would be in effect while a long-term policy was being developed. We held public meetings and technical sessions on the proposal. In September of 1984, BPA implemented its interim policy. We expected that the Interim IAP would be in effect for approximately six months pending further study

of the issues. The policy responded both to increased nonfederal demand for access to the Intertie and a worsening BPA financial outlook.

We decided to strike a middle ground among all of these needs. Our first concern was to retain sufficient Federal Intertie capacity for our own use to aid us in meeting our costs, including our Treasury payments. This required that BPA have access to the California market at all times to sell significant amounts of surplus firm power and nonfirm energy. Our second concern was to provide the opportunity for Northwest utilities to sell their own firm and nonfirm surpluses to California buyers. This was important for economic as well as legal reasons. With respect to Canadian and other extraregional utilities, we took the position that their needs were to be met last.

The Interim IAP provided BPA and each Northwest generating utility with long-term access equal to their respective surplus firm power — this number could not be increased by new construction. Only firm sales were allowed. No new capacity-energy exchanges, capacity sales, or seasonal exchanges were allowed. No firm capacity was reserved for extraregional entities.

Short-term capacity was made available on an hourly basis for BPA and each Northwest generating utility according to "Formula Allocation." Allocations were made on a pro-rata basis based on each entity's declarations of available surplus energy for sale. Entities could not transfer their allocations among themselves. Extraregional entities would be granted hourly access only when all needs of Northwest entities had been satisfied.

Under the Interim IAP we were unable to make commitments for long-term power sales because of requirements imposed by the National Environmental Policy

Act. We provided the opportunity to make short-term firm arrangements only until July 1986. We also limited resources eligible for export to those in operation, removing incentive to construct new resources potentially damaging to the environment.

The Interim IAP faced judicial review in *Department of Water and Power v. BPA,* 759 F.2d 684 (9th Cir. 1985). The Department alleged that (1) BPA could reserve only enough capacity on the Intertie to deliver existing sales; (2) BPA could not interfere with competition by allocating shares of the Intertie on an hourly basis; and (3) BPA could not discriminate against Canadian access to the Intertie.

In its opinion, the Ninth Circuit upheld BPA on all points. The court held that (1) Congress intended that we have first priority on the Intertie for our existing and projected sales; (2) Congress did not intend for BPA to compete with other utilities for access to the Intertie and therefore BPA could allocate Intertie capacity among itself and Northwest utilities in a nondiscriminatory manner; and (3) BPA was required to provide access to U.S. extraregional utilities before providing access to Canadian power.

Near Term IAP. In January 1985, we released a draft "Near-Term Intertie Access Policy" (NTIAP) for public comment. During the spring of 1985, the existing Interim IAP was extended twice while BPA prepared the final near-term policy.

In May 1985, after completing an environmental assessment, BPA issued the NTIAP. In all but minor ways, it was identical to the Interim IAP. The short-term nature of the policy was based on the need to conduct extensive environmental analysis of providing for long-term firm

transmission for Federal and nonfederal resources. We consequently initiated an environmental impact statement on alternative long-term policies.

In establishing the policy, we stated that the Interim IAP had achieved the primary goal of assuring BPA access to the California market at prices based on our fully allocated costs. Though prices for Northwest nonfederal power had remained relatively stable under the Interim IAP, we found that prices for BPA's surplus power had increased to the levels paid by California buyers for other Northwest power. Overall, Northwest power remained competitive with other power supplies available to California.

The California Energy Commission and the California Public Utilities Commission challenged the Near Term IAP. Petitioners alleged that: (1) the NTIAP was a rate established without the process required under section 7 of the Northwest Power Act; (2) basing the NTIAP on BPA's financial needs was arbitrary and capricious; (3) BPA was unlawfully discriminating against extraregional utilities; (4) the NTIAP failed to conform to antitrust policy; and (5) BPA unlawfully excluded new generating resources from Intertie access.

On November 6, 1987, the Ninth Circuit again upheld our policy against legal challenge. The court held that: (1) the NTIAP was not a rate; (2) our financial rationale for adopting the policy was reasonable; (3) BPA and Northwest utilities have priority access over extraregional utilities; (4) our balance of antitrust policy with other requirements was sufficient, although the court suggested that BPA review and consider the CEC alternative for Formula Allocation in the development of its LTIAP; and (5) exclusion of new generating resources from the Intertie for environmental reasons was justified.

California Energy Commission v. BPA, 831 F.2d 1467 (9th Cir. 1987).

Long-Term IAP. Public involvement in the development of the LTIAP has been extensive. During the winter of 1985-86, we held several public meetings on the topics of long-term wheeling, nonfederal subscription rights to the Intertie, and access for extraregional resources. In March 1986, we issued a "Discussion Paper of Major Issues in the Development of the Draft Long-Term Intertie Access Policy."

In October of 1986, we issued our first proposed LTIAP and our draft "Intertie Development and Use Environmental Impact Statement" (IDU EIS) for public review and comment. The proposed LTIAP differed from the NTIAP in the following significant ways:

1. Long-term (20-year) firm wheeling (Assured Delivery) contracts;

2. Increased procedural requirements and harsher remedies for hydroelectric resources destructive of fish resources;

3. A "Hydro Cap" for spot-market allocations during "Condition 1" to ensure that utilities with hydro resources, particularly BPA, would have sufficient access to the Intertie during high water conditions;

4. Access for new resources necessary to support long-term firm transactions over the Intertie;

5. A requirement that nonfederal Intertie owners use their own capacity before making demands for access to the Federal Intertie;

6. Access for resources entitled to priority under Northwest Power Act section 9(i)(3);

7. A requirement that utilities exporting firm energy either commit to BPA service to meet their load growth or waive BPA's obligation to provide such service.

Extensive written comments were received on this proposal. During the summer of 1987, the Administrator held a series of face-to-face meetings with utility executives and interest groups for a frank discussion of the issues.

Based on these comments and discussions, we issued a second draft LTIAP on December 15, 1987. Changes from the October 1986 draft were intended to provide greater specificity and a wider variety of transactions for purposes of greater planning certainty and enhanced revenue protection to BPA. The revised proposal contained the following changes:

1. A near doubling of the amount of Intertie capacity set aside for nonfederal utilities by providing 440 MW for seasonal exchanges;

2. Additional capacity for long-term transactions if they involve a joint venture with BPA;

3. "Mitigation" requirements on firm transactions to reduce adverse impacts on our revenues resulting from providing long-term firm Intertie capacity to nonfederal utilities;

4. Allocation under Condition 1 based on the size of the market rather than the amount of available Intertie capacity;

5. A statement that BPA would change the method of allocating short-term capacity to nonfederal utilities during Conditions 2 and 3 when the third AC Intertie was constructed;

6. Prohibition of the transmission of the output of new hydroelectric projects located in "protected areas" within the Columbia River Basin.

Since releasing this "revised draft" policy last December, we have used a combination of formal and informal processes to better explain our proposal and better understand the positions of others. As a government agency, we are required to conduct a structured record-building process. At the suggestion of the California Energy Commission and the California Public Utilities Commission, we used a mutually agreeable moderator during four public sessions to ensure that we heard every point of view. Since December, the formal process has yielded over 3,000 pages of transcript and written comments, which we have reflected in our decision. A total of 149 written comments were received on the draft policy.

However, we did not stop there. Our project manager and staff have spoken informally to each utility and group expressing an interest in the policy.

Section 3. Concepts And Terms In The LTIAP

This section briefly discusses the provisions in the Long Term Intertie Access Policy and introduces some of the technical terms and concepts in the policy.

Assured Delivery means long-term firm contracts for delivery of power over the Intertie. The long-term commodity market between the two regions historically has been underdeveloped. The Interim and Near Term access policies did not provide for such transactions. Permitting long-term energy sales and exchanges can allow utilities to take advantage of the regional diversities between the Northwest and California. This will decrease the cost of

power for both regions and defer future resource construction.

A Scheduling Utility is the Northwest portion of a nonfederal utility that operates a generation control area within the Northwest, or any utility designated as a BPA "computed requirements customer." The LTIAP will provide 800 MW of Intertie capacity to Scheduling Utilities for Assured Delivery service. This amount may be increased after the proposed third AC transmission line is completed.

Of the 800 MW made available for Assured Delivery service, 444 MW is reserved for utilities with a firm power surplus for any type of transaction up to each utility's total firm power surplus as shown in a utility's Exhibit B. A utility's Exhibit B as set in the Policy cannot increase. The remainder of the 800 MW is available to all Scheduling Utilities for any type of long-term energy transaction on a first-come, first-served basis.

Utilities which own or control transmission lines of their own to California may receive access on the Federal portion of the Intertie after using their own capacity first. This provision attempts to distribute equally the benefits of the inter-regional transmission service.

Mitigation means compensatory requirements imposed on a utility in return for an Assured Delivery contract. Mitigation helps offset operational and economic problems attributable to a Scheduling Utility's firm power transaction that inhibit BPA's ability to generate revenues. The LTIAP allows utilities the flexibility to negotiate, contract-specific mitigation measures or to choose the "generic" mitigation measures outlined in the Policy.

Formula Allocation means the Intertie capacity made available to a particular utility for short-term sales of

energy on the spot-market. This is the other important energy commodity market the Intertie serves in addition to long-term sales. Due to varying water and weather conditions, hydro-based Northwest utilities and BPA often have surplus energy to sell on the spot-market. If this energy goes unsold it may be spilled over dams, wasting the energy potential. Northwest utilities and BPA also use this market for selling surplus firm power on a short-term basis. Utilities in California have short-term needs that are met by the spot-market. Historically, the Intertie has been used mainly to serve this market. Billions of dollars of benefits have flowed between the regions since the completion of the Intertie in 1968.

BPA has provided a methodology for allocating the remainder of the Intertie capacity after first providing for BPA firm contracts and Assured Delivery. This methodology varies with three differing conditions on the Intertie. BPA declares Condition 1 when the Federal Columbia River Power System (FCRPS) is in likelihood of spill. Condition 2 is when the FCRPS is not likely to spill but the supply of declared surplus energy in the Northwest exceeds the capacity of the Intertie. Finally, Condition 3 is when the supply of declared surplus energy in the Northwest is less than the capacity of the Intertie.

During Condition 1 it is critical to provide sufficient Intertie access to both BPA and Northwest utilities in order to avoid unnecessary waste of hydroelectric resources. During spill or likelihood of spill conditions the amount of potential generation far exceeds the capacity of the Intertie. Consequently, Condition 1 reserves specific Intertie shares for utilities with energy to sell. Conditions 2 and 3 are more competitive, relying more on the marketplace to determine which nonfederal utility receives access to the facility.

Protection of fish and wildlife is an important part of this policy. BPA is committed to preserve and enhance its programs and investments for fish and wildlife in the Columbia River Basin. The LTIAP adopts the Protected Area concept first proposed by the Northwest Power Planning Council's staff. The LTIAP prohibits Intertie access to resources developed in river and stream reaches within the Columbia River Basin designated by BPA as Protected Areas due to the presence of wildlife, high-value resident fish, and anadromous fish (fish that migrate to and from the ocean). The LTIAP will reduce Intertie access to a utility if it builds or purchases power from a project located in a protected area.

Section 4. Environmental Consequences

Council On Environmental Quality regulations for implementing the National Environmental Policy Act require that we identify any environmentally preferable alternatives within the range of alternatives considered in arriving at our decision. That is the purpose of this section.

Three approaches to Formula Allocation for hourly access to the Intertie were considered in arriving at the method contained in the LTIAP. These included the Pre-IAP, Proposed, and Hydro-first procedures. Analyses presented in the IDU EIS (volume 1, chapter 4) indicate no significant difference in the environmental effects of the Pre-IAP and Proposed Formula Allocations. The Hydro-first Formula Allocation would result in slight increases in Northwest hydro generation and small reductions in Northwest coal generation (IDU EIS, volume 1, section 4.1.2.2). The changes in hydro operations would not be significantly more adverse for Northwest fish resources (IDU EIS, volume 1, section 4.2.3) than those

resulting from the other two Formula Allocation approaches. The decrease in coal operations would result in a small reduction in air pollution in the Northwest. However, this would be offset by small increases in air pollutant emissions as a result of increased operation of oil and gas plants in California and coal plants in the Inland Southwest (IDU EIS, volume 1, section 4.3.2). Overall, from an environmental perspective, the Formula Allocation options do not differ significantly.

With regard to Assured Delivery, environmental analyses were conducted for alternatives involving amounts of capacity ranging from 0 to 800 MW for nonfederal firm transactions (IDU EIS, volume 1, section 4.1.3). Several environmental tradeoffs were identified in these analyses. Assured Delivery results in small increases in new resource development in the Northwest and reduced development of new resources in California and the Inland Southwest (IDU EIS, volume 1, section 4.4). It also has the potential, at least regarding seasonal power exchanges, to have significant adverse effects on resident fish at Hungry Horse reservoir (IDU EIS, volume 1, section 4.2.3.3) and on cultural resources surrounding the following storage reservoirs: Grand Coulee, Hungry Horse, Albeni Falls, Libby (particularly), and Dworshak (IDU EIS, volume 1, section 4.2.2.3).

Assured Delivery is also associated with slight increases in pollutant emissions in the Northwest and slight emission reductions in the Southwest (IDU EIS, section 4.3.2), though neither of these effects considered significant. On balance, given the mitigation measures taken by BPA to address the adverse effects of Assured Delivery on resident fish and cultural resources, the provision of Assured Delivery for power sales and seasonal power

exchanges is neither more nor less environmentally preferable than denial of such access.

The fish and wildlife protection measures included in the LTIAP are intended to ensure that our fish and wildlife investments are not jeopardized. Their inclusion in the policy is environmentally preferable to their absence.

A more wide-ranging definition of protected areas may be environmentally preferable to one limited to the Columbia basin. However, we have chosen to focus on the basin to comport with the range of our fiscal investments, relying on other regulatory processes to assure protection outside the basin. It cannot be concluded that any significant environmental benefits would derive from extension of BPA's protected areas beyond their current limits.

The decision on the Intertie Access Policy is based in part on the IDU EIS. Subsequent decisions on the DC terminal expansion, the Third AC Interconnection and potential power marketing actions will also be based on the IDU EIS.

PART TWO

TRANSMISSION CAPACITY AVAILABLE FOR SPOT MARKET TRANSACTIONS

"FORMULA ALLOCATION"

Section 1. Federal Capacity Needs

ISSUE NO. 1: Should the LTIAP accommodate all BPA's transactions on the Intertie, and make only the residual capacity available to nonfederal utilities (the "Federal-first" option)?

REFERENCE: 1987 draft policy § 5(c)
Final LTIAP § 5(c)

A. *BPA Proposal*

It is important to distinguish between two distinct commodity markets served by the Intertie. The long-term market consists of firm power commodities that provide capacity-deferral value to California utilities and, in the case of certain types of exchanges, to Northwest utilities as well. The short-term market consists of spot-market commodities (both firm and nonfirm) that allow California utilities to displace their own generation (principally oil- and gas-fired units) whenever their decremental costs are greater than Northwest selling prices (including wheeling and losses). BPA and Northwest scheduling utilities depend on the same Intertie capacity to engage in both long-term and short-term transactions.[2]

If we were concerned only about BPA firm sales, large amounts of Intertie capacity could be made available to

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[2]Except for PGE and PP&L, which have their own Intertie capacity.

others without material revenue losses for BPA. Projected BPA firm power sales to California would utilize only a portion of the full Intertie.

A more difficult allocation issue arises because of BPA's need to make spot-market sales. If our only objective were to maximize revenues available for Treasury repayments, supply conditions on the Federal hydro system during normal hydrological conditions would cause BPA to load the entire Intertie with Federal energy 74 percent of the time during the spring runoff from January through June (46 percent of the time over a year), just to make spot-market sales.[3] Tr. 472. During wet years, we would utilize even more. If we satisfied all these Federal needs for transmission capacity before making *any* capacity available to others, nonfederal utilities would receive little Intertie capacity for their spot-market sales and *no* capacity for their year-round, firm-power transactions.

This is the "Federal-first" method of Intertie allocation that is so attractive to our total requirements customers. Under Federal-first, BPA would utilize whatever Intertie capacity was necessary to sell all its firm and nonfirm energy to California. No nonfederal utility would gain access until all BPA sales had been made. By utilizing the

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[3]These figures are based on present Intertie capacity and surplus amounts (including 846 average MW of surplus Federal firm energy). Percentages, based on monthly averages, would tend to increase if we assumed that Federal energy sales were concentrated into hours of peak demand.

As Intertie capacity increases with the DC terminal upgrade and addition of a third AC line, the percentages would likely decrease. However, between January and June in years with average water, we will often have energy sufficient to load the entire Intertie even if rated at 7,900 MW.

Intertie in this manner, we would cover more of our costs from sales to California utilities, lessening the upward pressure on rates to total requirements customers.[4]

Support for this proposal is found in two of BPA's organic statutes. Section 6 of the Regional Preference Act, 16 U.S.C. § 837e, states that Intertie capacity "which is not required for the transmission of Federal energy . . ." shall be made available for transmission of other electric energy. Section 6 of the Federal Columbia River Transmission System Act, 16 U.S.C. § 838d, provides that "[t]he Administrator shall make available to all utilities on a fair and nondiscriminatory basis any capacity in the federal transmission system which he determines to be *in excess of the capacity required* to transmit electric power generated or acquired by the United States" (emphasis supplied).

The United States Court of Appeals held in *Department of Water and Power v. BPA*, 759 F.2d 684, 692 (9th Cir. 1985) that these statutes require BPA to "reserve sufficient Intertie capacity not only for its current needs but also for its 'foreseeable' future needs, so long as the agency does not compete with other utilities on the mere speculation that it 'may have energy available' sometime in the future to sell to the same customer." The availability of nonfirm energy generated at Federal hydro projects

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[4]Some commenters seem to believe that Federal-first would apply only to BPA's usage of the Intertie for firm power sales. However, the Federal system was planned and is now operated to produce optimum amounts of firm and nonfirm energy. *U.S. Dept. of Energy — Bonneville Power Administration*, 29 FERC ¶ 63,039, p. 65,123 (1984) (administrative law judge's findings of fact), *affirmed*, 36 FERC ¶ 61,335 (1986). This fact and underlying legislation, described in the text, make it clear that no distinction between firm and nonfirm transactions need be drawn.

is not a matter of speculation. "In four out of five years, large amounts of nonfirm energy are available because streamflows seldom are anywhere near as low as historic records." *U. S. Dept. of Energy — Bonneville Power Administration.* 29 FERC ¶ 63,039, p. 65,123 (1984) (administrative law judge's findings of fact).

BPA has never utilized a Federal-first policy to determine who may use the Intertie. Allocation methodologies date back to the "Exportable Agreement" (Contract No. 14-03-73155), executed in 1969. This contract among BPA and Northwest generating utilities allocates Intertie capacity when the Federal hydro system faces spill — the condition in which flood-control restrictions on the system force water to be "spilled" past turbines without generating electricity.[5] The Exportable Agreement allocates Intertie capacity on the basis of each Northwest seller's declared surplus energy in relation to total Northwest declared surplus supply.

Without a policy that provides for long-term transactions, this share-and-share-alike arrangement still makes it difficult for utilities to engage in firm power transactions over the Intertie. There is nothing in the Exportable Agreement to ensure that a utility's pro-rata share of Intertie capacity during spill conditions will be sufficient to cover any firm obligations. In this sense, the Exportable Agreement makes all Intertie wheeling service interruptible — with two specific exceptions.[6]

Both the Interim IAP and the NTIAP carried forward the Exportable Agreement's pro-rata sharing concept,

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[5]Spill occurs when river flows exceed the generating capability of a particular hydro project or when flows exceed the demand for power.

[6]Firm wheeling was provided for two seasonal exchange transactions involving WWP, SCE, and SDG&E.

denominated "Condition 1." The 1986 and 1987 draft LTIAPs also utilized Condition 1.

BPA's Interim IAP, NTIAP, and draft final policies have also shared Intertie capacity among Federal and nonfederal utilities during all other Northwest energy supply conditions. Condition 2 is declared when the Federal hydro system is not likely to spill, but energy supply declarations by Northwest generating utilities exceed available Intertie capacity. Each utility then receives a pro-rata allocation of capacity. Condition 3 is declared when the Federal hydro system is not likely to spill and energy supply declarations by Northwest generating utilities are less than the available Intertie capacity. Each utility receives capacity to transmit its full declaration; extraregional utilities have access to remaining capacity.

In reviewing the Interim IAP, the court of appeals upheld BPA's action to reserve a pro-rata share of Intertie capacity for Federal sales under the three conditions. Responding to an allegation that BPA should be required to compete with other Northwest utilities for Intertie access, the court wrote in *Department of Water and Power v. BPA,* 759 F.2d at 692:

> it is clear from the legislative history that Congress did not intend BPA to compete with other Northwest utilities for access to the Intertie. The theme of the [Preference] Act is that BPA, as owner and operator of the Intertie, should be allowed preference in transmission of its electricity as necessary to meet its statutory mandate of being self-financing. Only if the agency still has capacity remaining on the Intertie after it has sold available and foreseeable power, is it required to make the Intertie available to other utilities.

The court has not addressed directly the question of whether we must reserve for BPA Intertie capacity greater than a pro-rata share. This Federal-first issue seems to be open for consideration under the LTIAP.[7]

B. Summary of Comments

The Exportable Agreement expires December 31, 1988. BPA's total requirements customers therefore suggest that we face a new decision about allocating Intertie capacity for spot-market sales. These customers want us to adopt a Federal-first policy that ensures that BPA retains enough Intertie capacity to market all of its surplus energy. The DSIs claim that applicable statutes require a Federal-first policy to ensure that the agency repays the Treasury and keeps its rates to industrial customers as low as possible. Tr. 401.

Speaking for utilities that rely on BPA for their total energy requirements, WPAG states the argument for a Federal-first policy most strenuously. WPAG would reduce the capacity made available to nonfederal utilities and impose a new charge on the capacity we make available:

> [After the Exportable Agreement expires] BPA will have no contractual obligation to continue this sharing of Federal Intertie capacity with non-Federal entities. It appears that continuation of Formula allocation will cause BPA to lose about $50 million annually. It is time for BPA to discontinue this

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[7]There are two discrete issues pertaining to Formula Allocations. The first issue deals with BPA's usage in relation to nonfederal utilities. The second issue relates to the appropriateness of making an individual allocation of capacity available to each nonfederal utility in the Northwest. This pat of the decision deals with only the first issue.

> practice of giving up Federal Intertie capacity it could use in order to facilitate non-Federal sales. BPA should either commence a policy under which it takes whatever amount of Intertie it needs for nonfirm sales, or imposes a fixed per kilowatt charge on non-Federal utilities to reimburse it for revenues foregone due to operation of the Formula allocation provisions. WPAG, #3-201, p. 5.

NGPU also supports a Federal-first policy but recognizes that such a policy choice would be controversial. While NGPU believes that BPA should not become the "deep pocket" for the region by adopting a policy which harms its revenues, NGPU admits the problems associated with adopting a Federal-first policy:

> BPA would likely achieve its greatest revenues under such a policy although there would be severe utility and political unrest. BPA has long since abandoned such a policy . . . We understand the need for cooperation within the utility industry and the desire to share markets and try to operate the power system as if it is under one ownership. NGPU, #3-100, p. 2.

Other total requirements customers supported a "Federal-first" policy, arguing that BPA owes them a responsibility to maximize revenues through Federal sales over the Intertie. Umatilla Electric Coop., #3-104, p. 1; Benton Electric Coop., #3-163, p. 1; Big Bend Electric Coop., #3-90, p. 1; Clark County, Wash., PUD, #3-109, p. 2; Harney Electric Coop., #3-103, p. 1; NGPU, #3-100, p. 2; NIU, #3-081, p. 1; Ferry County, Wash., PUD, #3-83, p. 1; Vigilante Electric Coop., #3-139, p. 1.

The CEC also supports a Federal-first policy by which BPA would reserve enough capacity for its own needs. CEC Chairman Imbrecht believes BPA "should reserve to

itself, on a long-term basis to deliver, capacity sufficient to deliver the surplus firm power and nonfirm energy that it is reasonably likely to market." Tr. 419. Under CEC's alternative Formula Allocation methodology, no nonfederal utility would gain access to the Intertie until "[a]fter BPA's allocation has been sold . . . ." CEC, #3-218 (Attachment 1). Also, CEC proposes that "BPA could restrict competition with its sales when it is selling at or below [its] 'cost-based' [nonfirm energy] rate, but permit competition with its sales when it sets a rate higher than its fully allocated cost." CEC, #3-218, p. 16.

This recommendation contains a qualification, however. Chairman Imbrecht would also require BPA to limit its Intertie usage each hour to "capacity needed to deliver its actual sales for that hour." *Id.* CEC does not explain how we might preschedule Intertie usage 24 to 72 hours in advance, based on actual sales which may or may not materialize later on a real-time basis.

Among California utilities, SDG&E supports a policy under which "BPA simply set[s] aside a fixed amount of Intertie capacity needed for its own use and make[s] the remainder available for use by willing buyer and seller utilities on a fair and non-discriminatory basis." SDG&E, #3-196, p. 1.

Another California utility, PG&E, also advances as one of three alternative policies a Federal-first proposal whereby we would reserve two-thirds of the available Intertie for BPA's energy sales. PG&E, #3-188, appendix, pp. B-2, B-3. The remaining one-third would be made available as a block to nonfederal utilities. *Id.* We will address this PG&E alternative in greater detail later in this decision.

As one would expect, Northwest generating utilities unanimously oppose a Federal-first policy. They support continuing the allocation methodologies used in past Intertie access policies that gave BPA no more than a pro-rata share of capacity. For example, PGP concludes:

> The idea of setting aside intertie capacity for BPA's nonfirm energy transactions and in effect, reducing any non-federal utility's Formula Allocation so that BPA can sell all of its energy is not economic, is inefficient, and is illegal. PGP, #3-194, p. 8.

These are strong words, left unexplained in PGP's comments. However, PGP's message is unescapable: the LTIAP should not reduce publicly owned utilities' sales over the Intertie. In its reply comments, PGP suggests that nonfederal utilities would react to a Federal-first policy by using their own nonfirm energy to serve their loads and thus displace firm BPA power sales. *Id.* PGP is supported by the Tacoma, Seattle, Eugene, and Chelan publicly owned generating systems. TCL, #3-130, p. 1; SCL, #3-136, p. 1; EWEB, #3-137, p. 1: and Chelan, #3-121, p. 1.

PPC, which represents a consortium of public generating and nongenerating utilities, sided with the former on this issue. It asks "that some kind of allocation mechanism be continued under Condition 1 and 2." PPC, #3-125, p. 4.

Investor-owned utilities also side with the public generators. WWP claims the present allocation system is supported by existing law and ensures widespread use of this regional resource among Northwest generators. WWP, #3-122, pp. 22-23. Allocation of Intertie capacity adds to the transmission resources of Northwest generating utilities. *Id.*, p. 22. *See* comments of Montana Power Co., Utah

Power and Light Co., and the Intercompany Pool: MPC, #3-111, p. 1; UP&L, #3-191, p. 1; ICP, #3-131, p. 1, and ICP, #3-199, p. 4.

PSP&L opposes any Federal-first policy. It states that BPA is not entitled to receive any "preferential or disproportionately large allocation of Intertie capacity for nonfirm transactions." PSP&L, #3-117, p. 5. However, in oral comments PSP&L seemed to argue both for and against Federal-first. On the one hand, it claimed that "the idea of BPA-first is something that never arose during the [1964] Intertie negotiations." Tr. 479. On the other PSP&L argued that the Intertie was a regional resource which BPA would use for its own purposes, "the balance of which would be made available to the Region and allocated appropriately within the Region." *Id.*

C. *Analysis and Decision*

A strong case can be made for a Federal-first policy in terms of BPA revenue needs. However, this alternative would effectively prohibit the use of Intertie capacity for firm power transactions between Northwest nonfederal utilities and California. Nonfirm energy transactions by nonfederal utilities would also be greatly curtailed. We do not believe that all commenters who advocate Federal-first are aware of this outcome of their proposal.

A more balanced approach allows nonfederal utilities to share Intertie capacity while still permitting BPA to sell all of its firm surplus power and large amounts of nonfirm energy. Of course, this decision causes some jeopardy to our ability to recover costs and meet Treasury obligations: we would utilize less Intertie capacity to make fewer sales. However, commenters such as PSP&L are correct in observing that the Intertie was envisioned as a resource available to nonfederal utilities. The statutes

cited above have been interpreted by BPA and the court of appeals to grant the Administrator substantial discretion in exercising business judgment to balance these conflicting objectives.

Another point to be considered is that Federal-first would cause nonfederal generating utilities to use their energy to displace BPA power sales in the Northwest. Maximum Federal usage of the Intertie shifts nonfederal energy to Northwest markets presently served by BPA.

There are other ways of addressing the concerns of total-requirements customers and the Treasury. First, the LTIAP will provide that BPA utilizes at least its pro-rata share of Intertie capacity for Federal spot-market sales during each Formula Allocation condition, regardless of decisions about continuing allocations for nonfederal utilities. Second, we are adopting the "true-up" adjustment in Conditions 1 and 2 for application when BPA is unable to utilize its full Intertie allocations. Third, we are preserving pro-rata allocations for BPA and nonfederal utilities during Condition 1, when spill conditions are most likely to drive our price below the cost of providing spot-market energy. Fourth, the LTIAP will allow us to increase Federal allocations under all conditions when necessary to minimize revenue losses from emergency actions taken to protect fish in the Columbia basin. Each of these provisions is described later in this decision.

We stress the importance of reserving Intertie capacity for BPA under each Formula Allocation condition. This follows the holding in *Department of Water and Power v. BPA*, 759 F.2d 684, 692 (9th Cir. 1985) ("it is clear from the legislative history that Congress did not intend BPA to compete with other Northwest utilities for access to the Intertie"). Each revenue-protective measure in the

LTIAP depends on a pro-rata share of Intertie capacity for BPA.

When we fail to make sales, one of two things must occur. Either our costs must be borne by our total-requirements ratepayers or the Treasury is not repaid. Because the Treasury is the last creditor in line, BPA's payments to the U.S. Treasury are impacted the most. We believe we have a responsibility to establish policies that ensure that BPA sells a significant amount of its surplus. Failure to do so puts at risk BPA's other customers and our ability to make Treasury payments.

It is not reasonable to suggest that we incur revenue losses to be recovered through rate increases to our Northwest customers. As explained above, our total requirements customers have a strong statutory argument — apparently supported by many in California — that we should adopt a Federal-first policy to maximize Federal sales over the Intertie. Additionally, we are guided by the directive to provide "the lowest possible rates consistent with sound business principles." Imposing some of the cost of power sold to California on our Northwest customers is not consistent with that directive. By rejecting Federal-first, we incur an obligation to provide these customers with rate stability through alternative means. First among these alternative protections is the reservation of Intertie capacity for BPA's spot-market sales.

If the revenue-protective measures adopted in the LTIAP prove unworkable or unduly controversial, the obvious remedy is not more Intertie access for nonfederal utilities. Instead, it is Federal-first.

ISSUE NO. 2: How should BPA compensate for side effects of the Regional Preference Act that impair its ability to sell energy in the spot-market?

REFERENCE: 1987 draft policy § 5(c)(1)(B)(ii)
Final LTIAP § 5(c)(1)(B)(ii),
§ 5(c)(2)(B)

A. *BPA Proposal*

One feature of the 1987 draft was a proposal to compensate for an inhibition of our ability to sell spot-market energy caused by the Northwest Regional Preference Act, 16 U.S.C. § 837, *et seq.* We face a serious revenue problem because of the Regional Preference Act requirement that we quote our energy price to Northwest utilities before making any sale to California. Northwest demand at our quoted price determines whether energy is surplus to the needs of the Northwest and available for sale to California.

This requirement was intended to give our Northwest customers a first right of refusal on energy before it is marketed to the Southwest. However, the requirement also allows Northwest utilities, which are both our customers and our competitors, to know BPA's price even when we do not know their prices.

The market for power in California is often less than available Intertie capacity because of California minimum generation requirements. When this situation occurs during Condition 1, Northwest utilities are able to employ their knowledge of the BPA price to undercut the BPA price. They can use their allocations to cut our hourly sales to a small Southwest market just when we have the

least ability to store water for future energy sales.[8] If a "real-time" BPA pricing iteration were even possible, we would again be required to announce our new price to the Northwest. Regional preference makes BPA a "sitting duck" for its Northwest competitors. We can waste hydro energy, by spilling, in a situation where competition cannot work properly because of the special competitive advantage provided to our competitors under the Regional Preference Act. As the Intertie is expanded and Southwest utilities bring on new generation that cannot be displaced with spot-market purchases, the frequency of this problem will increase.

The 1987 draft policy reduced BPA's vulnerability by reducing the size of Scheduling Utility allocations. We did this by limiting Intertie capacity available for allocation to the size of the California market in Condition 1 situations when market size was less than Intertie capacity. The 1987 draft allocated Intertie capacity to Northwest utilities based on the size of the market in California at BPA's then-applicable rate.

Before making this proposal, we set out to assess its revenue impacts. Analyses indicate that BPA would lose approximately $16.4 million in 1989 if we did not rectify this problem. This loss would decrease to $10.7 million in fiscal year 1992. Beyond 1992 the loss is expected to increase, mainly due to projected fuel price increases. *See* BPA staff Analysis of Condition 1: Intertie Allocation Alternatives (January 6, 1988).

Allocations based on market size would not necessarily cause the Intertie to be underutilized. Purchasers with

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[8]This problem can occur during Conditions 2 and 3 as well. However, we have greater ability to store water under those circumstances.

low decremental costs may choose to displace those resources with additional energy purchased at BPA's market expansion rates after the first allocations are made. Tr. 36, 203.

During public meetings in January 1988, we heard many criticisms of the latest proposal. On January 27, 1988, we therefore advanced an alternative that would (1) allocate Intertie capacity without regard to California market size, but (2) allow BPA to increase ("true-up") its Condition 1 allocations on subsequent days if its sales into a small California market were cut below its pro-rata share of that market by Northwest competitors with their knowledge of BPA's price. Another notable change in the January alternative is that it does not require us to determine California market size based on price.

B. *Summary of Comments*

This issue drew comments from both California and the Northwest. The 1987 proposal is opposed by Northwest investor-owned utilities and California utilities and regulators. Some prefer adoption of the January alternative. On the other hand, Northwest public generators favor the 1987 proposal.

ICP objects to allocating to the market size because of the incentive it gives BPA to determine market size. On behalf of Northwest IOUs, ICP states:

> Bonneville has provided itself rate flexibility over a very wide range. Based on its own selection of price, Bonneville will determine the size of the market. Setting a high price can make the market, and resulting allocation, very small. ICP, #3-119, p. 7.

Utilities in California echo this concern. SCE comments that allocating access based on BPA's determina-

tion of the California market "constitutes classic price fixing." SCE, #3-187, p. 16. *See* also CEC Chairman Imbrecht's comments, Tr. 417; and SDG&E, #3-196, p. 2. SMUD and SCE also express concern that the 1987 proposal, if adopted, would leave portions of the Intertie unused. SMUD, #3-183, p. 3; SCE, Tr. 435.

ICP indicates that the proposal discussed at the January 27 public meeting "solves our concerns about . . . allocation to a market." ICP, #3-119, p. 8. WPAG's total-requirements customer membership agrees:

> Of the two proposals offered by BPA, it appears that the most recent offering would be the most workable. It eliminates the notion of allocating to the market, which seemed to raise serious problems. WPAG, #3-123, p. 13.

The following parties also find the January 1988 alternative preferable to the 1987 proposal: MPC, #3-111, p. 6; PG&E, #3-188, p. 31; TANC, #3-182, p. 3; WAPA, #3-189, p. 2; and WWP, #3-122, p. 21.

In contrast, Northwest public generating utilities tend to favor the 1987 draft LTIAP. EWEB comments that:

> [A]llocating to the Southwest market will assure BPA of a fair share of the market, thus providing a measure of Federal revenue protection by reducing non-federal opportunities to undercut price. Second, non-federal utilities will avoid the need to pay for wheeling costs associated with allocation that are greater than the market. EWEB, #3-200, p. 5; *see also* City of Port Angeles, #3-71, p. 1.

PGP also states that BPA should retain the proposal in the 1987 draft policy. PGP, #3-194, p. 6. To prevent portions of the Intertie from going unused, PGP suggests that Condition 1 could occur in two steps. "[T]he alloca-

tion is made first at BPA's applicable rate. Then, BPA should allocate remaining Intertie access based upon markets available through BPA's market expansion rate." *Id.*

PGP believes that the true-up mechanism will introduce marketing uncertainty for nonfederal utilities. PGP, #3-194, p. 7. SCE fears that "BPA's proposal will eliminate nonfederal allocations when BPA's energy is uneconomic to the Southwest because BPA over-prices its energy." SCE, #3-187, p. 18.

C. *Analysis and Decision*

Given the support for our 1988 alternative proposal from a cross section of interest groups, we see no reason to adopt the 1987 proposal that Condition 1 allocations ever be based on market size. The 1988 alternative satisfies the conflicting concerns about market manipulation and revenue protection.

We will attempt to utilize the full capacity of the Intertie during every Condition 1 hour. The BPA price will be known in advance to our Northwest customer/competitors pursuant to the Regional Preference Act; however, that price will not be used to limit the spot-market. In determining Intertie access, BPA will not need to estimate the market at any rate. Purchasers and sellers may negotiate any price. *See* Tr. 816.

SCE expressed some concern that even the true-up alternative might give BPA some ability to manipulate a market. We do not think that this will be the case. After all, the true-up would operate only when (1) the Federal hydro system is either spilling or facing likely spill, and (2) we are losing sales to Northwest competitors knowledgeable of our price. On subsequent days, the true-up provides us with some opportunity to minimize spill

conditions, or — if we are not actually spilling yet — utilize any unsold energy we were able to store on the first day. This is hardly a situation in which we would offer energy at "excessive prices. *Compare,* SCE, #3-187 p. 18. It is not unlikely that our asking prices would actually decline on subsequent days even with the true-up. There would seem to be little if any upward pressure on price, and Northwest customer/competitors would not know any clear BPA pricing pattern in advance of the notice required under the Regional Preference Act.

No one disputes that the Regional Preference Act causes BPA a revenue dilemma, especially at times when we face spill on the hydro system. The true-up alternative is the least obtrusive remedy.[9] We believe that it avoids any implication of market manipulation.

Under Condition 2 the Regional Preference Act side effect is somewhat less critical. However, BPA still loses sales by absorbing the difference between the actual market and the allocated capacity of the Intertie. The LTIAP, therefore, now includes a true-up for Condition 2. Since we are more removed from actual spill conditions, Condition 2 true-up is optional rather than automatic. This provision protects BPA's revenues.

It is true, as PGP suggests, that the true-up provision will cause some marketing uncertainty for nonfederal utilities. This uncertainty has heretofore been borne by BPA and its total requirements customers. The true-up mechanism spreads this uncertainty among other sellers of spot-market energy.

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[9]Energy sold by BPA under the operational mitigation provisions of policy section 4(d) will be credited against the true-up account.

ISSUE NO. 3: **Should Federal allocations be increased to minimize revenue losses from emergency actions taken to protect fish?**

Reference: 1987 Draft policy § 5(a)
Final LTIAP § 5(a)

A. *BPA Proposal*

On occasion, water must be released from Federal reservoirs in quantities sufficient to cover fish spawning areas, facilitate downstream fish migration, or achieve other measures to protect fish resources. Sometimes, we first learn of the need for these water releases only after Formula Allocations have been established under section 5 of the LTIAP. Without an override provision to increase BPA's allocation, we could be forced to spill water past hydro turbines without generating electricity. The 1987 draft policy gives us the flexibility to increase BPA's allocation when necessary to limit revenue losses associated with actions to protect fish in the Columbia River basin.

B. *Summary of Comments*

Only two parties commented on this issue. ICP objects to BPA "reserving the right to wipe out nonfederal allocations whenever BPA's fish and wildlife requirements, such as water budget, would otherwise cause spill on the Federal system." ICP, #3-119, p. 10. *See also* Tr. 378. The other comment comes from PSP&L: "BPA may not reduce the amount of Intertie capacity available for Formula Allocation to . . . 'minimize revenue losses associated with actions taken to protect fish in the Columbia River drainage basin.'" PSP&L, #3-117, p. 5. Neither commenter elaborated on its position.

C. *Analysis and Decision*

The LTIAP retains this provision, which is necessary to cover those situations when BPA must take emergency actions to protect fish and wildlife; for example, when entities managing the fish and wildlife resources in the Columbia River Basin call us on short notice to release water. We need to protect BPA's revenues from unforeseen releases of stored water.

This provision will accomplish three objectives. First, it gives BPA the ability to act quickly to protect fish resources in the Columbia River Basin. When the situation arises, we will not be forced to call the scheduling utilities and rely on their good will to relinquish a portion of their allocations. This will save time. Second, it reduces all allocations proportionally, thereby equitably spreading the impact among all utilities. Third, it protects us from unnecessarily losing revenues due to circumstances beyond our control.

We stress that the provision covers only extreme circumstances in which BPA lacks sufficient prior notice of the need to change the water release and therefore has been unable to make an adequate declaration.

ISSUE NO. 4: How much flexibility should we incorporate into the criterion for implementing Condition 1?

REFERENCE: 1987 draft policy § 5(c)(1)(B)
Final LTIAP § 5(c)(1)(B)

A. *BPA Proposal*

Under both the 1986 and 1987 draft policies, BPA declares Condition 1 when the Federal hydro system is in "spill or likelihood of spill." This criterion is intended to

provide our schedulers with enough flexibility to avoid spill whenever possible. A more rigid definition would push us closer to the time when flood control restrictions force spill. Once the Federal system begins spilling, water cannot be stored for later sale and hydro energy is wasted.

B. *Summary of Comments*

Of the California utilities and regulators only SMUD and PG&E commented on this issue. BPA's total requirements customers offered no comments.

Northwest generating utilities, public and private, ask that BPA should quantify the definition of "spill or likelihood of spill." Although these comments are short on elaboration, we discern that generating utilities believe we will use the flexibility of the proposed criterion to advantage BPA in relation to nonfederal sellers. PP&L asks us to bound our flexibility with a definite limit, such as likelihood of spill over the next 30 days. PP&L, #3-138, p. 2. PGP states, "We encourage BPA to 'announce' a condition based on anticipation of spill within a reasonable period of time, or upon a determination by BPA that energy would be wasted otherwise." PGP, #3-194, p. 8; *see also* ICP, #3-119, p. 6; PSP&L, #3-117, p. 9.

Among some IOUs, this concern is coupled with dissatisfaction about the Condition 1 Hydro Cap proposal. The Hydro Cap would have given disproportionately large Condition 1 allocations to hydro systems such as BPA's. IOUs did not want the LTIAP to give an impression that only hydroelectric energy would be transmitted during Condition 1. *E.g.,* PP&L, Tr. 218.

SMUD states that "the definition of Condition 1 should be made more precise, particularly since there may be

significant incentive for BPA to declare Condition 1 if the proposed mitigation measures are adopted." SMUD, #3-183, p. 3. PG&E in its proposal for a preferred long-term Intertie access policy suggests that Condition 1 be determined by a condition of "spill or imminent spill conditions." PG&E, #3-188, p. 35.

C. *Analysis and Decision*

BPA schedulers do not believe they can manage the Federal hydro system to minimize the waste of hydro energy if they are constrained to an arbitrary time limit such as the one proposed by PP&L. Anticipating a spill condition is an operational determination that relies on the interplay of numerous unpredictable factors, many subject to sudden change. Arbitrary constraints limit our ability to protect BPA when these conditions change.

The Northwest depends on the hydro power system for a large percentage of its electrical needs. The runoff in this system is highly variable. Average annual runoff is 134 million acre-feet (MAF), but in the past has ranged from a low of 78 MAF to a high of 193 MAF. Monthly mean streamflows (unregulated) can range from 40,000 cubic feet per second (cfs) in January to 1,240,000 cfs in May.

The hydro system consists of many small run-of-the-river projects — with limited daily or weekly storage — and much larger "seasonal storage" projects whose storage may be drafted over a year or more before emptying or refilling. Since streamflows do not occur in the same pattern as electric energy requirements, water is used as a storage medium for potential energy.

The streamflow pattern is regulated into a more usable "shape" by controlling project outflow to store energy when natural streamflows exceed load requirements and

to release stored energy when needed. Total storage capacity of the system is only about 42 MAF — significantly lower storage capacity than average runoff. Thus, the hydro system has the potential of producing about 12,000 average MW (aMW) of "firm" energy during low runoff conditions. It can generate about 16,000 aMW on a long-term average basis and about 19,000 aMW in a high runoff year. This means that in planning the coming year there is an additional unknown factor. Up to 7,000 aMW of nonfirm energy may or may not be available.

In January, the first snowpack measurements and forecasts of spring runoff are made. Flood control curves are developed to prevent flooding in the spring, and refill requirements are developed to ensure that firm loads are met and reservoirs refill by July 31. This would not be difficult if accurate forecasts of the January-through-July runoff were available. However, the January forecast is based on actual snowpack and projected precipitation through July. Actual precipitation can vary greatly from projections. Since most storage reservoirs and drainage areas are relatively remote, little accurate data are available on amounts of snowpack loss or gain between surveys.

Even with January-through-July runoff projections updated monthly, flood control requirements may cause a hydro project to be run full-load one month and at minimum the next month to permit refill because of an unexpectedly low snowpack measurement. The closer to July, the more accurate the forecast, since less of it is based on forecasted precipitation. If a reservoir is not drafted enough, flood control will force water to be spilled, a loss that can run to tens of thousands of dollars per hour. With an annual runoff that varies between about 60 percent and 145 percent of normal, and limited storage space, hydro operations is really a continual balancing act

between maximizing revenues and the need to refill annually for recreation, fisheries, and to assure future energy needs.

In this context, a 30-day limit on determining the "likelihood of spill" seems completely arbitrary. Of course, what we call flexibility, others call ambiguity. However, this tension has existed to some degree since the Intertie went into commercial operation. The Exportable Agreement, which has governed similar situations since 1969, covers situations where BPA schedulers anticipate "electric energy of the Federal Columbia River Power System . . . which would otherwise be wasted because of the lack of a market therefore in the Pacific Northwest at any established rate. . . . " Subjective terms in this criterion, which simply repeats language from section 1(c) of the Regional Preference Act, obviously leave much discretion to BPA's schedulers.

During the public meetings, no one rebutted the BPA chief scheduler's statement that we have been able to explain, after the fact, decisions to implement Condition 1 in the past. Tr. 214. On a prospective basis, however, "we're not capable of forecasting all the kinds of conditions we can get into." *Id.* Therefore, the criterion of the 1987 draft is retained in the final LTIAP.

PG&E asks us to use "imminent spill" as an implementing criterion. "Imminent" is defined as "likely to occur at any moment." Random House Dictionary, 1980. Under such a narrow definition, we could not avoid unnecessary spill. This appears to be a problem of semantics. PG&E's proposal is intended to give our system schedulers some degree of flexibility; however, the "imminent spill" criterion fails to meet this objective.

Regarding SMUD's concern about mitigation requirements for Assured Delivery contracts under the LTIAP, we discuss below the mitigation charge alternative open to any utility as an alternative to Condition 1 mitigation.

ISSUE NO. 5: Should the LTIAP incorporate the "Hydro Cap" limit to increase allocations for BPA and other predominantly hydro-based utilities during times of likely spill?

REFERENCE: 1987 draft policy
Final LTIAP

A. *BPA Proposal*

The 1987 draft policy calls for BPA and Northwest scheduling utilities to declare surplus energy available for export. Whenever the Federal hydro system is likely to spill, each seller would receive a share of Intertie capacity approximating the ratio of its hydro capacity to total Northwest hydro capacity, multiplied by "available Intertie capacity." This sharing based on hydro capacity is called the "Hydro Cap." Since Condition 1 is in effect during times of likely spill, we proposed that allocations favor hydro generation over thermal generation. The Hydro Cap gives larger allocations to BPA and other sellers whose generation mix is predominately hydro. Tr. 219.

We responded to criticisms of the Hydro Cap by advancing an alternative at the public meeting of January 27, 1988. Tr. 804. The proposal eliminated the Hydro Cap and based allocations on all surplus energy declared by Northwest sellers. This January 1988 proposal also contained the "true-up" mechanism described earlier in this decision as a method of protecting BPA revenues.

B. *Summary of Comments*

Publicly owned generating utilities objected to the Hydro Cap when it was first proposed in the 1986 draft policy. They labeled the provision an "overkill" solution that provided BPA with excessive allocations. EWEB, #1-082, p. 6; PGP, #1-056, p. 18; SCL, #1-090, p. 15. After the 1987 draft policy was released, however, the public generators changed positions. They now appreciate that as hydro systems they too would stand to benefit:

> The Hydro Cap is the appropriate method of allocating Intertie capacity while BPA is in a spill condition. . . . It is irrelevant and irresponsible to include thermal generation in the allocation of Intertie capacity while the Northwest's hydro resources are being spilled. EWEB, #3-200, p. 5.

Seattle concurs, stating that a "policy . . where thermal resources are running [at the same] time hydro is spilling, is a policy that is not in the best interests of anybody in the region." Tr. 844. PGP and APAC also support allocations based on the Hydro Cap. APAC, #3-110, p. 2; PGP, #3-124, p. 8.

Northwest investor-owned utilities have more balanced mixes of thermal and hydro resources. PP&L sums up the position of those who oppose the Hydro Cap

> To limit a Scheduling Utility's formula allocation to hydro capacity unfairly penalizes those utilities who, in cooperation with the rest of the Northwest, developed thermal resources under the Hydrothermal Program to ensure regional adequacy. It also appears that BPA's basis for this discriminatory provision is unsound, since such an allocation basis has no link to the actual total regional energy surplus. PP&L, #3-138, p. 2.

See comments of ICP, #3-119, p. 6; MPC, #3-212, p. 2; and WWP, #3-122, p. 23.

Washington Water Power Co. addressed the public generators' fear that removal of the Hydro Cap would cause Northwest utilities to spill hydro resources while thermal resources were operated to sell energy over the Intertie. WWP's Vice President Bryan stated:

> I think the point needs to be made that once we make a preschedule, that doesn't mean that we don't talk to each other during the day. And at any time that a thermal resource is operating and somebody else in the Northwest has a hydro facility that has surplus and [is] spilling, my company is always willing to take energy in to displace that thermal. We talk to each other hourly as to what's going on in our systems, so I think the issues of operating thermal plants and having hydro plants spilling just doesn't make sense. Tr. 845.

Pacific Power & Light also indicated that it is always willing to displace its thermal with hydro: "If there is energy out there to buy, we'll buy at any time, on an hourly basis, generally." Tr. 846.

Public utility commissions addressing this issue oppose the Hydro Cap. The Wyoming Public Service Commission supports the IOUs' claim that fairness dictates that BPA does not use the Hydro Cap in determining allocations under Condition 1. It states that "thermal generation which is available to the Pacific Northwest during drought conditions, benefits all of the Pacific Northwest including Bonneville. Since Bonneville derives such a benefit it should then give some consideration to these facilities and their owners when the Pacific Northwest is experiencing surplus conditions." WPSC, #3-73 p. 1. The

Oregon Public Utility Commission prefers an alternative of allocating available capacity to all resources with a variable cost less than the BPA nonfirm energy rate. OPUC, #3-134, p. 2.

Two California commenters further the argument laid out by the Northwest IOUs. TANC recognizes that when the Northwest is in Condition 1, "there will be base loaded thermal units operating which will be contributing to the surplus condition as well as hydro." TANC believes those utilities should be allowed access to the Intertie during Condition 1. TANC, #3-182, p. 3. SCE also favors abandoning the Hydro Cap. SCE, #3-187, p. 17.

During the January public meetings, those favoring the Hydro Cap advanced a new concern about its elimination. EWEB made the point that "uneconomical resources, such as combustion turbines, could be included in a utility's declaration without any intention by the utility to actually operate them." EWEB, #3-137, p. 4. This is a fear that the thermal-based systems will seek to inflate their Condition 1 allocations by declaring surplus energy from every possible source, including high incremental-cost combustion turbines which operate only on occasion to meet a utility's peak load and do not contribute to a utility's hourly energy surplus. Tr. 822.

A response to this second concern was provided by ICP director Merrill Schultz who pointed out that over-declaration has never been a serious problem:

> [T]here is always the potential of people over-declaring. It hasn't happened. There are good reasons that it hasn't happened. There are people watching. Occasionally, you get stuck with your declaration and have to make good on it. Tr. 830.

As we understand Mr. Schultz's point, it is that utilities would be wary of inflating their declarations with gas-turbine energy at incremental costs of 40 to 50 mills/kWh. Any abuse would become apparent if that utility succeeded in inflating its allocation and then left it unused because its 50-mill resource would command only 18 mills/kWh in a Condition 1 market.

Late in the process, PGP offered a compromise proposal:

> We are concerned that surplus energy declarations are often manipulated to the detriment of BPA and other non-federal utilities. As an example, we oppose inclusion of uneconomic combustion turbines in a utility's declaration. In order to enforce this proposal, we suggest that BPA utilize the concept embedded in the Exportable Agreement, and request, on an occasional basis, documentation which identifies the resource composition of the surplus energy declaration. PGP, #3-194, p. 5.

C. *Analysis and Decision*

When the Federal hydro system faces spill, other systems might not always be in the same condition. The Hydro Cap could give disproportionately large shares of Intertie capacity to hydro-based utilities when they may not face a threat of spill, while frustrating the marketing activities of utilities with hydro and thermal resources.

We also agree with the ICP that several factors deter over-declarations. First, the take-or-pay feature of our IS-87 transmission rate requires a utility to pay for its allocation regardless of its actual use. Tr. 840. Second, BPA monitors declarations and is aware of each utility's resources and capabilities. We have not observed significant over-declarations under past policies. Tr. 187. From

time to time we can request documentation on each utility's declaration as a further assurance against inflation. The content and frequency of such requests are left for BPA power schedulers to resolve in implementing the policy.

Given our adoption of the true-up mechanism and our decision about Condition 1 allocations (discussed below), we do not believe that the Hydro Cap is necessary to protect BPA revenues or avoid spill on the Federal hydro system. Also, the Hydro Cap also does not appear necessary to protect nonfederal utilities from spill.

Section 2. *Allocations Of Capacity To Nonfederal Utilities*

ISSUE NO. 1: How should the policy differentiate between the spot-market Intertie capacity requirements of Northwest and extraregional utilities?

REFERENCE: 1987 draft policy § 6
Final LTIAP §§ 6, 8(b)

A. *BPA Proposal*

We proposed to distinguish between Northwest and extraregional needs by limiting extraregional access to Condition 3. During times of likely spill on the Federal hydro system and when Northwest surplus energy supplies could fill the entire Intertie, we proposed to serve BPA and Northwest needs first. This principle and our underlying legal position were reflected in earlier versions of the Intertie access policy expressly affirmed on review. *Department of Water and Power v. BPA*, 759 F.2d 684, 694 (9th Cir. 1985) ("Congress intended that the Intertie be used primarily for the benefit of Northwest and Southwest utilities and not for the benefit of Cana-

dian utilities"); *California Energy Commission v. BPA*, 831 F.2d 1467 (9th Cir. 1987).

B. *Summary of Comments*

No California utility expressly requests that extraregional resources be given Intertie access during Condition 1. However, they do request that extraregional utilities be given access during Condition 2.

PG&E is most adamant in its comments on this issue. Its position is based on legal argument. PG&E claims that 16 U.S.C. § 837e and § 838d make "no mention of any distinction between utilities inside and outside the Pacific Northwest." PG&E, #3-188, p. 9. PG&E further cites 16 U.S.C. 839f(d) and § 839f(i)(3) and concludes that there is "no basis in law for BPA to create a priority in the provision of its transmission services for utilities within the Pacific Northwest." *Id.*

Turning its attention specifically to Canadian extraregional utilities, PG&E believes that both BPA and the court of appeals in *Department of Water and Power v. BPA* "misread" the legislative history of 16 U.S.C. § 837e. PG&E believes that language of the statute prohibits any distinction between the Northwest and extraregional utilities.

British Columbia Hydro does not request Condition 1 access. Tr. 447-49. BC Hydro has much greater hydro storage capability than the Northwest; it rarely faces a spill condition. Instead, BC Hydro simply requests that we abolish Condition 2 — with its limitations on extraregional access — when the Northwest's firm power surplus decreases below 500 average MW. BCH, #3-186, p. 2.

BC Hydro asks for clarification of section 6(b) in which it would receive Intertie access under Condition 2

if it agreed to increased participation in the Northwest's coordinated planning and operation in the Columbia River Basin or to provide other consideration of value. BCH, #3-186, p. 2.

C. *Analysis and Decision*

We have decided to continue the limitation that allows extraregional utilities Intertie access only during Condition 3. This limitation may be relaxed in the future, as specified in section 6(b) of the policy. Tr. 240.

Our legal authority to grant Intertie access priority to Northwest utilities over extraregional utilities has been fully considered by the court of appeals. The Court has held that Congress intended the Federal Intertie to be used primarily for BPA's present and foreseeable needs. BPA has the authority to establish the terms and conditions of nonfederal access to protect its ability to generate revenue to cover its costs and repay the Federal Treasury.

Capacity excess to our needs must be provided on a fair and nondiscriminatory basis first to Northwest utilities.[10] Capacity surplus to the needs of Northwest utilities must be made available on a fair and nondiscriminatory basis to U.S. extraregional utilities. Capacity beyond the needs of U.S. extraregional utilities *may* be made available to Canadian utilities.

Northwest utility priority is clear from the legislative history of the Regional Preference Act and P. L. 88-511 (appropriations for the Federal portion of the Intertie). Congress's listing of the expected Intertie benefits in-

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[10]A change in this priority might result from a mutually beneficial arrangement between BPA and an extraregional utility. *Department of Water & Power v. BPA*, 759 F.2d 684, 694, n.14 (9th Cir. 1985).

cluded only those arising from transactions between the Northwest and Southwest.[11]

The only exception was the narrow category of Canadian Treaty power which has priority under section 6 of the Regional Preference Act., 16 U.S.C. § 837e. In all other respects, the legislative history states only that BPA "may" contract with Canadian utilities for Intertie transmission of non-Treaty Canadian power. H. Rep. No. 590, *supra,* p. 3350.

The court also held that Congress did not establish equal priority for extraregional utilities in section 6 of the Federal Columbia River Transmission System Act. 759 F.2d at 694.

Recent legislative actions also support the distinction made between regional and extraregional utilities. Section 9(i)(3) of the Northwest Power Act, 16 U.S.C. § 839f(i)(3), directs the BPA Administrator to provide transmission and other services "unless he determines such services cannot be furnished without substantial interference with his power marketing program. . . . " This is broad discretionary language emphasizing the primary obligation of BPA to cover BPA's costs and repay the Treasury and the requirement to balance all other activities against this obligation. BPA consequently has broad authority to determine that access for extraregional power will substantially interfere with the BPA's power marketing program.

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[11]H. Rep. No. 590, 88th Cong., 2d Sess. pp. 2, 4 (1964); Conf. Rep. No. 1822, 88th Cong., 2d Sess. 4, 7 (1964); Department of Interior, Report to the Appropriations Committees . . . Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest, p. 32 (1964).

In 1985, four months after the Ninth Circuit issued its opinion in *Department of Water & Power*, Congress passed an appropriations act authorizing construction of additional Intertie facilities between the Northwest and California. The act expressly provides:

> Nothing in this Act or in the Memorandum [of Understanding between the California utility owners] shall in any way affect, modify, change, or expand the authorities or policies of the Bonneville Power Administration under *existing law* regarding . . . transmission access.

P. L. 99-88, 99 Stat. 293 (1985) (emphasis added).

Late in 1986, Congress passed the Electric Consumers Protection Act, 16 U.S.C. § 797(e). A savings clause was inserted (§ 17(a)(4) and (7)) to clarify that the Act was not intended to affect in any way the transmission authorities of Federal power marketing administrations, such as BPA, or to affect the Northwest Power Act. A colloquy on the Senate floor between Senator Evans and Senator McClure, the Senate Energy Committee chairman, indicated their intent that the Electric Consumers Protection Act not affect BPA Intertie access policy upheld in *Department of Water & Power*:

> [T]he authority of Federal power marketing agencies to regulate access to transmission facilities owned by the Federal government . . . *has recently been upheld against court challenges* . . . and it is not the intent of this legislation to alter or diminish that authority in any fashion." 132 Cong. Rec. S.15388, October 6, 1986 (emphasis added).

Priority access for regional utilities over nonregional utilities has a sound policy basis, as well. First, Northwest generating utilities operate their systems in a coor-

dinated fashion with BPA. One major example is the Pacific Northwest Coordination Agreement. Through this agreement, Northwest generating resources are coordinated to produce the most power at the least cost from all of the region's generation, regardless of ownership. This agreement and others depends upon assured access to the region's transmission system to efficiently move power between utilities and from generation to load.

Second, most of the Northwest region shares the hydrologic characteristics of the Columbia River system (which includes the Snake system). It is the characteristics of this system which were the reason for the construction of the Intertie in the first place. High spring flows produce more generation than can be used in the Northwest and which is valuable in California.

The Intertie was built primarily to move this surplus power to California. Opening up the Federal transmission system on an equal basis to extraregional utilities is contrary to Congress's intent to move Northwest power out of the region when it is surplus and potentially spilled.

ISSUE NO. 2: Should the LTIAP continue the Condition 2 and 3 practice of allocating individual capacity shares to Scheduling Utilities?

REFERENCE: 1987 draft policy §§ 5(c)(2), 5(c)(3), 5(d) Final LTIAP §§ 5(c)(2), 5(c)(3), 5(d), 5(e), 5(f)

A. *BPA Proposal*

Condition 1 exists when we face the likelihood of spill on the Federal hydro system. Pro-rata capacity alloca-

tions are made among BPA and Northwest utilities on the basis of their surplus energy in relation to the total Northwest surplus. There seems to be little controversy about the need for a Condition 1 allocation methodology. Support for the basic concept of Condition 1 allocations comes even from PG&E. PG&E, #3-188, p. 35; and PG&E appendix, p. 7 ("During spill conditions the Intertie is allocated to its capacity based on its declarations on a take or pay basis.").[12]

Nonfederal allocations during Conditions 2 and 3 have been far more contentious. California utilities and regulators have argued that the practice of allocating individual capacity shares to nonfederal utilities is anti-competitive and needlessly paternalistic toward the Northwest.

Condition 2 exists when we do not face a likelihood of spill, but declarations of surplus energy from Northwest utilities exceed available Intertie capacity. Pro-rata allocations are made to each Northwest utility declaring surplus energy.[13] In Condition 3, there is even less likelihood of spill and available Intertie capacity exceeds declarations of surplus energy from Northwest utilities. After Northwest needs are met, residual capacity is made available first to U.S. extraregional utilities and then to Canadian utilities.

Competition. We have proposed Condition 2 and 3 allocation procedures to offset the market power of California utilities over the southern portion of the Intertie.

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[12]"Take-or-pay" obligations is apparently a reference to the IS-87 Intertie transmission rate, which remedies over-declarations. *Supra*, p. 11.

[13]When there is sufficient energy within the Northwest to fill the Intertie, BPA shares capacity with only Northwest utilities. *Department of Water & Power v. BPA*, 759 F2d. 684, 693-94 (9th Cir. 1985).

Pro-rata allocations under Intertie access policies mirror Intertie access in California. Four California utilities own approximately 80 percent of Intertie capacity in California. They are extremely reluctant to share their unused capacity among either themselves or nonowners (the "California have-nots"). As a result, we cannot transmit our spot-market products to willing California buyers lacking transmission capacity. Also, access restrictions in California reduce the price for Northwest energy — including BPA energy — below levels prevailing in a competitive market.

This is a major concern for BPA, which incurred a net expense of $213 million in fiscal year 1987 and $65 million in fiscal year 1986. Nevertheless, the 1987 draft policy sought to address California's concerns by adding a new section 5(d), which ceased making individual allocations to nonfederal utilities under Conditions 2 and 3 when the third AC line was completed. We concluded that California Intertie concentration would be lessened by addition of this new line in which other California utilities would have ownership. Under our proposal, nonfederal utilities would then compete for access to a broader California market.

However, section 5(d) also contained a qualification designed to provide a test of our conclusion about California market concentration:

> . . . this provision will not be operative if the Administrator determines that:
>
> (1) even after commercial operation of the third AC, Intertie access continues to be impaired for California utilities presently lacking ownership in the southern portion of the Intertie, or

(2) Southwest utilities utilize some pro rata scheme to allocate energy purchases over the Intertie.

Indirect revenue effects on BPA. A second reason for LTIAP allocation procedures has been concern about the indirect revenue effects of their elimination. Actions that depress nonfederal revenues from California sales harm our balance sheet due to our statutory obligations to Northwest utilities.

A change in Formula Allocation procedures could depress the revenues of Northwest utilities that receive $160 million in annual residential exchange subsidies under Northwest Power Act section 5(c). *See Pacificorp v. FERC,* 795 F.2d 816 (9th Cir. 1986). Surplus energy revenues are used as a credit in calculating each utility's "average system cost" under the program. *Id.* When these utilities make less money on sales to California, it has the unfortunate side effect of increasing their residential exchange payments. To some extent, Congress has made BPA an insurer against the risk that Northwest utilities fail in their own California marketing programs.

Different Formula Allocation procedures could also reduce the surplus energy revenues of publicly owned generating utilities. These BPA preference customers buy some of their power requirements from BPA, generate the rest from their own resources, and also use their resources to generate surplus energy for sale to California. If this energy is not sold to California, their recourse is to displace purchases from BPA *without notice. City of Seattle v. Johnson,* 813 F.2d 1364 (9th Cir. 1987). Our "availability charge," upheld in *City of Seattle,* has been an incomplete and very controversial remedy to this displacement problem. Two more challenges to the availability charge are pending before the Ninth Circuit.

Throughout discussion of the 1987 draft policy, we asked the public to consider ways in which section 5(d) might be implemented sooner than the commercial operation date of the third AC transmission line. *E.g.,* narrative explanation of the 1987 draft, p. 10 (December 15, 1987); and Tr. 231. On February 11, 1988, we released two sensitivity studies which identify the revenue impacts on BPA of implementing proposed section 5(d) immediately. One study identified revenue losses of $6 million per year, growing to $10 million per year, if the public generators stopped making sales to California and used all their nonfirm energy to displace purchases from BPA. A second analysis studied the growth in residential exchange overheads related to implementing section 5(d). This study showed a BPA cost increase of about $6 million per year. *See* letter dated February 11, 1988, from IAP project manager.

B. *Summary of Comments*

California Energy Commission. CEC's first alternative proposes that "BPA could restrict competition with its sales when it is selling at or below this 'cost-based' rate, but permit competition with its sales when it sets a price higher than its fully allocated cost." CEC, #3-218, p. 16.[14]

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[14]The "below-cost" component of CEC's first proposal reads:

"(a) In each hour when BPA declares its nonfirm energy standard rate to be at or below the cost of nonfirm energy as determined in the most recent BPA rate case, BPA shall allocate Intertie capacity first to itself based on the ratio of its declaration to the sum of all declarations, multiplied by the available Intertie capacity. BPA may increase this allocation by multiplying it by a further factor, determined in the most recent rate case, if BPA determines in that rate case that additional capacity is necessary to mitigate the revenue impact on BPA, as predicted in the decision in the most recent rate case, of (i) allowing others to compete with BPA when

CEC believes that this prolix alternative would allow us to harmonize revenue concerns with competition. *Id.,* pp. 17-18. The CEC proposal incorporates a mixture of Federal-first principles, a Federal "true-up" mechanism, pro-rata allocations whenever the market price was "at or below the cost of nonfirm energy as determined in the most recent BPA rate case," and first-come, first-served allocations under other circumstances.[15]

This alternative is remarkable because it is a Federal-first alternative more extreme than anything ever proposed even by our total-requirements customers. Not only would we reserve all Intertie capacity necessary for BPA firm and nonfirm energy sales, CEC would also allow us

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it sells above cost, and (ii) allowing competition among Scheduling Utilities and Extraregional Utilities. After BPA's allocation has been sold, all remaining Intertie Capacity shall be made available to the remaining Scheduling Utilities and Extraregional Utilities, first come-first served based on first transactions arranged with California utilities. If BPA is unable to sell its allocation at its declared price in time to preschedule the remaining capacity, it may, at its option, (I) lower its price to a market expansion rate in order to sell its allocation and make the remainder of the capacity available to the remaining. Scheduling Utilities and Extraregional Utilities, first come-first served based on first transactions arranged with California utilities, (II) sell all available BPA energy using the entire Intertie capacity at whatever rate or rates it can get at or below its initially declared price and allocate those sales, after the fact, pro rata, based on the declarations to those Scheduling Utilities and Extraregional Utilities who wish to participate, or (III) sell what it can at its original price and leave the remainder of the Intertie unfilled." [CEC, #3-218, Attachment 1.]

[15]The "above-cost" component of CEC's first proposal reads:

"(b) In each hour when BPA declares its nonfirm energy standard rate to be above the cost of nonfirm energy, BPA shall allocate all Intertie capacity, first come-first served based on first transactions with California utilities."

to *prohibit* all nonfederal sales at any price until "[a]fter BPA's allocation has been sold. . . ." *See* footnote 14, above. If we failed to sell all our energy at our asking price, CEC then proposes that we (1) reduce our price to some market-clearing rate and then make residual capacity available to others first-come, first-served, (2) reduce our price and implement a pro-rata allocation plan like the one used in Conditions 1 and 2 of the 1987 draft policy, or (3) adhere to our original price, sell what we can, and "leave the remainder of the Intertie unfilled." *Id.,* thereby prohibiting nonfederal sales.

As we understand the CEC's first alternative Formula Allocation methodology, it would give BPA complete control over Northwest sales whenever the California bid for spot-market energy was "at or below" our cost-based rate for nonfirm energy. What Northwest utility would ever offer spot-market energy below the BPA nonfirm rate, if we could respond by prohibiting nonfederal sales — even during spill conditions? If we were more concerned about BPA's share of the spot-market than the unit price of our energy, the CEC alternative would permit us to offer energy only at the cost-based rate and prohibit access to nonfederal utilities day after day.

As a variant on its extreme Federal-first policy, CEC suggests that we might offset, in advance, the estimated revenue losses associated with competition among nonfederal utilities by taking more than our pro-rata share of the Intertie and making the remainder available to other sellers as a block. CEC, #3-218, pp. 17, 44.

> [W]hile most of the attention in the past has been focused on the extreme alternative of a 'BPA first' policy that gives no one else access until BPA has sold *all* of its energy, we want to suggest . . . the alternative of simply mitigating the estimated reve-

> nue impacts of allowing competition among non-federal sellers by taking a small amount more than a pro rata share for itself and making the rest available to others as a block. *Id.*, p. 45.

CEC estimates that BPA would normally reserve for itself 60 percent of Intertie capacity available for spot-market transactions. Increasing that amount to 63 percent would offset revenue impacts identified on our two sensitivity analyses released on February 11, 1988. *Id.*, pp. 44, 48.

CEC's second proposal focuses on its perception that the benefits of Intertie transactions should be shared equitably over time between the Northwest and California. "If BPA were serious about trying to share the benefits equally between the regions, it could adopt an LTIAP that would alternate periodically between competition and pro rata allocation." *Id.*, p. 37, note 37. This alternative calls for periodic reassessment of interregional benefits from Intertie transactions. If California's benefits were greater than the Northwest's, we would allocate Intertie capacity on a pro-rata basis as in the 1987 draft policy. A year later, we would reassess the balance. If the Northwest were then the net beneficiary, we would cease allocations and make capacity available first-come, first-served.

The cycle would continue annually. This second CEC alternative seems to make interregional controversy an annual event, undoubtedly followed by Congressional oversight hearings and judicial review.

In responding to our 1987 draft policy, CEC criticizes proposed section 5(d) as "an inadequate solution to the anticompetitive aspects of the LTIAP" because of its vague terminology. CEC, #3-218, pp. 33-36. CEC objects

to the lack of criteria for determining whether California Intertie usage is still restrictive after the third AC line goes into commercial operation. It characterized the section as "little more than window dressing which attempts to shore up a legally questionable part of the policy." *Id.*, p. 36.

Pacific Gas & Electric. PG&E, on the other hand, suggests that section 5(d) be implemented "immediately and unconditionally." While stating that Condition 1 allocations are acceptable, it argues that we lack justification for allocating access under Conditions 2 and 3. PG&E, #3-188, p. 24. PG&E proposes these modifications to Formula Allocation provisions:

> During all times other than spill or imminent spill conditions on the Federal Columbia River System, BPA, Pacific Northwest utilities and extraregional utilities compete for access on Intertie capacity available after BPA has met its contractual obligations, including its own firm power transactions, Canadian Treaty power transactions and the provision of long-term firm transmission service . . . .
>
> During spill or imminent spill conditions, a formula allocation mechanism similar to that proposed in the LTIAP is used to assign shares of available Intertie capacity to BPA and Pacific Northwest utilities. PG&E, #3-188, p. 35.

Appended to PG&E's comments is an "Economic Analysis of Bonneville Power Administration's Intertie Access Policy," by Decision Focus Incorporated ("DFI appendix"). The DFI appendix, which contains an analysis of three Formula Allocation alternatives, has several unfortunate shortcomings. First, none of its analyses were presented for review in the discussions held at the request

of PG&E and other California parties early in 1988. Second, none of DFI's three alternatives correspond exactly to the Formula Allocation modifications (quoted above) proposed in the text of PG&E's comments. Third, DFI analyzed only Northwest markets; it assumes that the California market is competitive.

The DFI appendix describes two alternatives to our 1987 draft policy, denominated "BPA-first" and "Fully competitive when not spilling." PG&E's "BPA-first" alternative is similar to section 5(d) of the 1987 draft policy. DFI appendix, p. B-8. PG&E assumes that BPA revenues equal those generated under the 1987 draft LTIAP; however, share-the-savings pricing governs nonfederal spot-market transactions whenever the Intertie is full. *Id.,* p. B-9. Under PG&E's "Fully competitive when not spilling" alternative, all sales are assumed to be governed by a share-the-savings price cap, established by BPA, whenever the Intertie is full. *Id.,* p. B-10. Whenever the Intertie is not full, energy is assumed to be sold at lower, "market-clearing" prices. *Id.* That is, PG&E proposes a price cap whenever California demand might bid up energy prices, but no price floor when supply might cause prices to drop.

PG&E compares its calculation of benefits between each of the two alternatives and the 1987 draft in the following table shown in the DFI appendix:

Surplus Nonfirm Revenue Analysis
(FY 1989 $Million/Year)

	LTIAP	Competitive For Non-BPA	Change From LTIAP	Competitive For All PNW	Change From LTIAP
BPA Intertie Sales	182.0	202.3	+20.3	151.6	-30.4
Transmission Revenues	5.6	2.5	-3.1	2.5	-3.1
Expansion Sales	89.3	48.7	-40.6	48.7	-40.6
Total BPA Revenue	276.9	253.5	-23.4	202.8	-74.1
Non-BPA Intertie Sales	53.0	18.0	-35.0	17.9	-35.1
PSW Costs	235.0	220.3	-14.7	169.5	-65.5

Source: PG&E, #3-188, Appendix B, p. B-4.

Several conclusions are apparent from this DFI table, which we assume here to be accurate for purposes of this discussion.

First, PG&E's estimate of Formula Allocation effects on California is $65.5 million per year. *See* "Change from LTIAP" column. For California to realize this $65.5 million, BPA must forgo $74.1 million in annual revenue. This is not a "zero-sum" game because we would lose revenue in the Northwest as well as in California.[16] DFI

[16]The difference is the result of two changes in the Northwest. As "Non-BPA Intertie Sales" drop by $35.1 million, Northwest nonfederal utilities use more of their spot-market energy to displace higher incremental cost generation in the Northwest. Our "Expansion Sales" drop by $40.6 million, yielding a net loss to BPA of $5.5 million. Also, our Intertie "Transmission Revenues" drop by $3.1 million.

The DFI appendix reference to lost Expansion Sales confirms and materially increases our study results about Northwest public generators' use of spot-market energy to displace our firm power sales to those utilities. Because of the magnitude of DFI's lost "Expansion

has failed to reflect higher residential exchange overheads in BPA's forgone revenues, so the $74.1 million figure could grow as high as $80 million per year.

Second, of the $65.5 million amount, $30.4 million represents increased BPA revenues under the 1987 draft LTIAP and $35.1 million represents extra revenues to Northwest nonfederal utilities receiving pro-rata allocations under all Formula Allocation conditions. California utilities and regulators have focused principally on the latter nonfederal revenue amount as the "paternalistic" effect of Intertie access policies. However, the measure of this alleged effect, shown in the table row labeled "Non-BPA Intertie Sales," is virtually identical between PG&E's "Competitive for Non-BPA" ($35 million) and "Competitive For All PNW" ($35.1 million) alternative Formula Allocation procedures. If PG&E's concern lies with the LTIAP's treatment of Northwest nonfederal utilities, it should be indifferent as between its two alternatives.

Other comments. California utilities and regulators complain that the practice of allocating individual pro-rata shares of Intertie capacity to each nonfederal utility removes any incentive these utilities might have to reduce their prices in hopes of increasing their respective spot-market shares. California's basic position coalesces on the same proposition advanced to the Ninth Circuit in earlier review proceedings:

> CEC and CPUC argue that this pro rata allocation formula is an abuse of discretion because it is anti-competitive and BPA's stated justifications could be achieved by a less anticompetitive alternative. They

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Sales" figure, we conclude that DFI has also computed the amount of lost nonfirm sales to Northwest investor-owned generating utilities.

> assert that BPA should be required to adopt a policy whereby it would first allocate to itself whatever capacity is needed to satisfy its revenue obligations, and then allow the remainder capacity to be filled by competitive, spot-market transactions rather than by the pro rata formula. [*California Energy Commission*, 831 F.2d 1467, 1475 (9th Cir. 1987).]

With two exceptions, this is a description of section 5(d) of the 1987 draft policy. It is also very similar to the "BPA-first" alternative in the DFI appendix to PG&E's comments. The two exceptions relate to treatment of extraregional resources during Conditions 2 and 3 (resolved in this decision at pp. 44-48) and the continuation of pro-rata allocations during Condition 1.

SCE "welcomes" the addition of section 5(d), but "continues to advocate the immediate elimination of all pro rata allocations for nonfederal utilities under all three conditions." SCE, #3-187, p. 19. Edison does not distinguish between spill and nonspill conditions. SCE Vice President Bjorklund proposes that "transactions be prioritized through natural pricing with the least expensive energy used first." SCE, Tr. 436.

Generally, California Intertie owners believe that section 5(d) would place BPA in the inappropriate role of deciding how they share their Intertie. They argue that their Intertie practices carry implicit Congressional sanction and that any problems should be left for judicial resolution under Federal antitrust laws. Hall, PG&E, Tr. 429, and PG&E, #3-188, p. 24; SCE, #3-187, p. 20; CEC, #3-218, pp. 26-33. They dispute the existence of anti-competitive practices in California and argue that they are not obliged to wheel for others. Gardiner, PG&E, Tr. 243, 248; SCE, #3-187, p. 20.

On the other hand, the municipal utility of Vernon, California, which lacks an interest in the Intertie, supports a section 5(d) review of alleged California anticompetitive practices. Vernon states that it has been denied access to the Northwest nonfirm energy market because of the ownership control of the southern portion of the Intertie. "Vernon is unable to obtain access even to the unused Intertie transmission ordered by the Administrative Law Judge in FERC Docket No. E7777." Vernon, #3-80, p. 2.

Among Northwest utilities, some oppose any change from pro-rata allocations during all conditions. WWP asserts that pro-rata allocations are consistent with existing law and ensure widespread use of the Intertie among all Northwest generators. WWP, #3-122, pp. 22-23.

PSP&L argues that the Exportable Agreement has allocated Intertie capacity since the construction of the Intertie. It "cannot now be argued that such an allocation was unlawful at the outset." PSP&L, #3-193, p. 2.

ICP and PGP also support allocating pro-rata shares of Intertie capacity to scheduling utilities. ICP, Tr. 374; PGP, #3-194, p. 8.

Other Northwest utilities specifically addressing section 5(d) support the provision. PGP applauded BPA's effort to go to a free and open market after construction of the third AC line. PGP, Tr. 384. PPC also supports section 5(d). PPC, #3-125, p. 5.

C. *Analysis and Decision*

California and the Northwest each claim support — in statutes, legislative history and Congressional acquiescence — for pro-rata allocations that the other labels

"anti-competitive." In California, a similar debate has continued since 1973 before the Federal Energy Regulatory Commission and Federal district court between Intertie "haves" and "have-nots." At least regarding the LTIAP, it is time to end the stand-off by attempting some practical resolution of problems that trouble both regions. Attempts at a solution should not await commercial operation of the third AC line.

We begin this analysis with the opinion in *California Energy Commission v. BPA,* 831 F.2d 1467 (9th Cir. 1987). The court instructed us to develop a policy, from proposals advanced during this proceeding, that is predictable, fair and nondiscriminatory while ensuring adequate BPA revenues. 831 F.2d at 1476-77. We must consider antitrust policies in deciding how to allocate Intertie capacity. "This need to consider the interests of preserving competition, however, does not override BPA's statutory obligations, repeatedly expressed in 16 U.S.C. §§ 832f, 838g, and 839e(a)(1), to be fiscally self-supporting." *Id.* at 1475. This is a practical test, not a requirement that we strive for a theoretical ideal unworkable on a day-to-day basis.

CPUC cites *California Energy Commission,* 831 F.2d at 1475, for the proposition that "Congress specifically articulated its intent that BPA operate its transmission lines in part 'to prevent the monopolization thereof by limited groups.' " CPUC, #3-199, p. 3. To the extent this passage applies to transmission, we believe it relates with equal force to practices on California's portion of the Intertie, at least to the extent necessary to protect BPA revenues. Tr. 226-29.

BPA concerns about California Intertie practices. We continue to be concerned about California practices that affect the price of spot-market energy sold over the

Intertie. These practices affect our revenues directly by lowering our prices of spot-market energy below levels that would prevail in a competitive market. Indirect revenue effects flow to BPA when lower spot-market prices cause Northwest nonfederal utilities to reduce their purchases of firm power from us or request higher residential exchange payments.[17]

We have been asked by California utility representatives to identify the practices among California Intertie owners that offend us and that we label "anti-competitive." Tr. 226, 230. We are troubled by pro-rata allocations in the Southwest that allow California Intertie owners to avoid sharing unutilized Intertie capacity among themselves or with the California "have-nots." We believe it economically unjustifiable for a California Intertie owner to leave portions of its share unutilized, even though other owners or nonowners have need for additional spot-market purchases from the Northwest. California Intertie practices suppress the price BPA and other Northwest suppliers can receive for their spot-market energy products.[18]

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[17]Some California commenters suggest that the sensitivity analyses released in February 1988 overstate the indirect revenue impacts on BPA. On the other hand, the DFI appendix to PG&E's comments suggests that Northwest displacement market losses could be four to seven times greater than we estimated. *See* pp. 55-56, above. The important point is that BPA lost $200 million during the last fiscal year and any change from present Formula Allocation procedures will diminish our revenues and increase our costs. We are not willing to dismiss as insignificant residential exchange cost increases of up to $6 million and Northwest displacement market losses of $6-to-$40 million per year. *See* footnote 16, above.

[18]Our concern about prices received by other Northwest sellers relates to the indirect revenue effects this has on BPA.

Pro-rata allocations under various Intertie access policies have always been intended to mirror and offset pro-rata allocations in the Southwest. California commenters argue that pro-rata allocations under the LTIAP tend to stabilize prices at levels higher than where sellers may increase their total sales by reducing prices. It is equally logical to conclude that pro-rata allocations of California Intertie capacity suppress prices below levels that would prevail in a market where more buyers bid independently.[19]

This concern should not necessarily be read as a demand that Intertie capacity always be made available at cost-based transmission rates. The benefits of a Northwest energy purchase can be shared between wheeling and purchasing utilities. This is something we thought we had helped facilitate through the Western Systems Power Pool experiment. *See Pacific Gas & Electric Co.*, 38 FERC ¶ 61,242 (1987). However, we do not believe that the promise of that experiment has been fulfilled.

Much of the discussion about California Intertie practices has focused on the supplemental letter agreement to the Memorandum of Understanding ("California Letter Agreement") among California utilities proposing to own and construct the third AC transmission line. Tr. 230. The California Letter Agreement establishes a pro-rata allocation methodology among all California Intertie owners —

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[19]We know that California Intertie owners have nonfirm wheeling arrangements with certain nonowners. The problem we hear repeatedly from nonowners, however, is that these arrangements are so cumbersome as to be unworkable in any practical sense. *E.g.*, Vernon, #3-80, p. 23. Nonfirm wheeling made available to California "have-nots" on 15 minutes' notice has little practical value. In contrast, BPA preschedules nonfederal usage of the Northern Intertie 24 to 72 hours in advance.

new and existing — after the third AC transmission line goes into commercial operation:

> In order that many California consumers share in the benefits of federally generated power, and in consideration of the benefits received by interconnection with the existing AC Interties (the Project and the two presently existing 500-kV Intertie lines), the Participants . . . agree, *in times when Bonneville Power Administration is allocating non-firm energy for export out of the Pacific Northwest* and the availability of such energy is less than the total available transfer capability in the then-existing Interties (including the Project), that said Participants will share in the limited availability of such energy *on a pro rata basis according to their respective allocations on all AC Interties.* [Emphasis supplied.]

The agreement divides the market for BPA energy among California utilities during Condition 3 and, sometimes, Condition 1. Tr. 226. The language of the California Letter Agreement suggests that no California utility would have an incentive to bid up the price for BPA energy, even to the FERC-approved rate of 18 mills/kwh, because no one could increase its pro-rata share.

If this language in the California Letter Agreement reflects the signatories' intent, there would be little reason for BPA to cease pro-rata allocations under Conditions 2 and 3. Doing so would simply lessen the chances of recovering *on average* the cost of our energy. During public meetings on the 1987 draft policy, no signatory seemed able to explain the effects of this agreement on competition. Tr. 236. Our questions about phrases such as "allocating non-firm energy for export" remained unanswered until PG&E filed its written comments.

Our understanding of the California letter agreement is now based on the written representations of PG&E (#3-188, p. 26), confirmed through informal discussions with PG&E, TANC, SCE, LADWP and CEC. According to these utilities, the letter agreement is intended by its signatories to neutralize the public preference requirement that we sell spot-market energy first to publicly owned utilities and cooperatives. The agreement applies only to BPA sales when our available energy is less than Intertie capacity and "only at times when BPA itself is allocating this energy among buyers on some basis other than price, i.e., selling all of it at one price." PG&E, #3-188, p. 26.

We express no opinion on the validity or wisdom of this agreement. However, California does claim that, if BPA offers energy at more than one rate (or under a share-the-savings rate), nothing in the California Letter Agreement will inhibit our ability to sell to the high bidder. TANC has represented that public preference would allow it only a first right of refusal to BPA energy priced at the high bid.

However, no such benign interpretation is possible for section 7.02 of the "California Companies Pacific Intertie Agreement" (California Intertie Agreement), between PG&E, SCE, and SDG&E.[20] In fact, California disclaim-

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[20]The provision reads: "7.02 *Northwest Power*

"Each Company shall have the right to purchase its share, based on Relative Size Percentages, of any Northwest Power acquired by any one or more of the Companies, on the same terms and conditions as the acquiring Company. However, consistent with the principle stated in the first paragraph of Section 6, the Coordination Committee shall make studies and recommendations regarding the reallocation of such Northwest Power, if necessary, to provide maximum equitable benefits to all the Companies. If any Company rejects all or part of

ers about the California Letter Agreement only heighten our concern about section 7.02. This provision applies across-the-board to all Northwest sellers, not just to BPA, for all types of spot-market and firm transactions, whether a single price or multiple prices are offered. Because it is an agreement among investor-owned utilities, it cannot possibly be construed as rectifying some perceived imbalance among them caused by public preference laws.

Section 7.02 creates a pro-rata allocation among these three utilities that inhibits price competition in California. The requirement that "[e]ach Company shall have the right to purchase its share, based on Relative Size Percentages, of any Northwest Power acquired by any one or more of the Companies, on the same terms and conditions as the acquiring Company" means that the price and quantity of every Northwest or BPA offer to sell spot-market energy can be communicated from PG&E to SCE to SDG&E. Any competitive motivation to bid up the price is counteracted by the fact that no utility is entitled to any more than a pro-rata share. Why would any buyer

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the Northwest Power so made available to it, the other Companies shall have the right to share the rejected amount in the ratio of their Relative Size Percentages; provided however, that the rejecting Company shall retain the right to recapture the power rejected by giving written notice five years in advance of the date when the recapture is to become effective, which recapture date shall not be earlier than twelve months after the accepting Company or Companies began taking such power. Before any Company may assign or transfer all or any portion of its Northwest Power to a non-Company entity, such Company must first offer it to the other Companies in the ratio of their Relative Size Percentages on terms and conditions no less favorable than those on which it is then purchasing such Northwest Power. If one of the Companies rejects all or part of such offer, the other shall have a right to accept all or a part of the rejected amount."

bid up the price if the amount of its purchases cannot increase? In effect, these three "competitors" act as a single dominant buyer of Northwest energy.

Elsewhere in section 7.02, parties to the California Intertie Agreement are accorded a first right of refusal over power from the Northwest. No California "have-not" may gain access until this right has been satisfied.

Section 7.02 of the California Intertie Agreement goes beyond the protection of private-property interests that the California investor-owned utilities hope to protect — and which we have no intention of overturning. To borrow a criticism from SCE, the California Letter Agreement is, "by design, the death of price competition on the Pacific Intertie." SCE, #3-187, p. 15.

Section 7.02 has been found "anticompetitive, unjust and unreasonable" by a FERC administrative law judge. *Pacific Gas & Electric Co.*, 26 FERC 63,048, p. 65,215 (1984). This provision is one we refer to when we complain of a California monopsony that affects us directly through our own spot-market sales and indirectly through cost consequences associated with Northwest utility sales to California.

SCE has asked with regard to Northwest energy that Intertie "transactions be prioritized through natural pricing with the least expensive energy used first." SCE, Tr. 436. However, this is only half the definition of an economically efficient power market. The least-expensive supply (the low offer in the Northwest) should be matched against the most-expensive displaceable resource in California (the high offer in California). Intertie restrictions embedded in section 7.02 of the California Intertie Agreement eliminate the possibility of SCE's "natural pricing" in the Southwest.

A new concern relates to a recent agreement between PG&E and Turlock Irrigation District under which PG&E has agreed to transmit energy from several different California utilities. Notably absent is an offer to transmit energy from BPA or other suppliers in the Northwest. The agreement indicates that PG&E will make power available from a variety of load-control areas in California, but not from the Northwest. We intervened in the regulatory proceeding on this agreement; however, FERC chose not to address the issue of PG&E's restriction on access to Northwest markets.[21]

These are our major concerns. They are shared by others in the Northwest and by California "have-nots." However, we would be remiss in stating our concerns without also proposing a way of resolving differences with our California customers. Section 5(d) has been rewritten to provide for an experimental period of 18 months during which we will cease making individual allocations to nonfederal utilities during Conditions 2 and 3. This experiment, which does not await commercial operation of the third AC line, is described as follows.

Experimental allocations. This experiment will commence only after the scheduling requirements, described below, have been developed. Then, during the 18 months of the experiment, Condition 2 and 3 procedures will be modified to exclude individual utility allocations.

Under Condition 2, when the declarations of BPA and Northwest utilities exceed available Intertie capacity, we would make a pro-rata allocation to BPA and leave the remaining block of Intertie capacity available to Northwest utilities as a whole. Each Northwest utility could

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[21] *See Pacific Gas & Electric Co.*, 42 FERC ¶61406 (1988).

then compete to make sales to Southwest utilities — with no assurance of any individual allocation.

Under Condition 3, when the declarations of BPA and Northwest utilities are less than available Intertie capacity, we would again make a pro-rata allocation to BPA and a block allocation for competition among Northwest utilities. U.S. extraregional utilities and then Canada could compete for remaining Intertie capacity. During Condition 3, we would expect significant competition whenever the size of the California market was less than Intertie capacity.

New scheduling requirements. Neither we nor participating utilities should rush head-long into this experiment. Before the experiment begins, our schedulers must resolve significant technical questions. To be effective, section 5(d) would require cooperation from all utilities involved. BPA and participating utilities would need a communications network to exchange current — possibly instantaneous — information on Intertie availability for both the Northwest and California segments. This information would include the unpurchased allocations by the hour for BPA, nonfederal utilities, extraregional utilities under Condition 3, and availability of the California Intertie — disaggregated by owner. We have not yet estimated the cost of participating in the communication system. These technical concerns will be addressed in informal sessions following implementation of the LTIAP.

We must also develop a replacement for the pro-rata allocation system to determine which utilities receive Intertie capacity during particular hours. One possibility might be to preschedule transactions on a first-come, first-served basis until the total nonfederal allocation is exhausted. Another option might be to develop an open

bidding system for nonfederal spot-market usage of the Intertie. A bidding system could be the economically optimal way of allocating demand for a limited transmission resource. It would tend to encourage transactions between sellers with the lowest incremental-cost resources and buyers with the highest decremental-cost resources. Use of a bidding system to allocate Federal Intertie capacity has been advocated by PG&E. *E.g.*, comments on the draft IDU EIS, pp. 7, 17, (January 14, 1988). Revenues produced by such a bidding system would diminish the revenues lost by making the Intertie available to others, thereby providing us with a new source of funds with which to repay the Treasury.

Review. Our most significant measure of the success of the section 5(d) experiment will be increased Northwest sales to California utilities that lack ownership or contractual interests in the California portion of the Intertie. We expect that Intertie practices in the Southwest will have to change so as not to restrict the market for Northwest energy in California. We are especially concerned that California utilities bid independently for Northwest spot-market energy, refrain from sharing information about pricing and quantities, and not reallocate the power purchased over the Intertie since this would negate any benefit provided by the experimental mechanism.

Our objective will be to remove provisions, like section 7.02 of the California Intertie Agreement, which limit opportunities for Northwest utilities, including BPA, to sell energy to any willing buyer in the Southwest. If this is to occur, parties to coordination of wheeling agreements among California utilities, such as the one between PG&E and Turlock Irrigation District, must be willing to amend such contracts to provide access for BPA and

other Northwest resources at terms no less favorable than those provided to any other bulk power supplier.

We anticipate that Turlock, Anaheim, and other "have-not" utilities will have incentive to bring restrictive agreements to light once the LTIAP is implemented. As we analyze the success of the section 5(d) experiment, it will not be a credible response for California Intertie owners to cite to wheeling or coordination agreements so cumbersome or restrictive that access to Northwest markets is rarely, if ever, provided to the "have-not utilities.

We will also review effects of the experiment on smaller utilities in the Northwest. Utilities such as EWEB have expressed concern about policy changes that could affect their ability to make spot-market sales.

We will analyze the success or failure of the experiment throughout its term. Utilities, regulators, and other interested parties will be encouraged to express their views in writing and through informal discussions. Public comment will be invited. At least 30 days before the experiment ends, we will issue a written report on whether to make the experiment permanent.[22]

It is our hope that section 5(d) — or an improved version thereof — will be maintained at the end of the 18-month test. Critical to our determination, however, will be the willingness of California utilities *and regulators* to promote a competitive market in the Southwest.

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[22]In the IDU EIS analyses, the "Pre-IAP" and "Proposed" allocation methodologies have essentially the same environmental consequences. Therefore, BPA has no environmental reservations about the experimental elimination of individual allocations for nonfederal utilities in Conditions 2 and 3.

Comparison to other proposals. As noted above, the section 5(d) experiment corresponds to the position of the CEC and CPUC during review proceedings in *California Energy Commission v. BPA,* 831 F.2d 1467, 1475 (9th Cir. 1987). It is also similar to one of the alternatives advanced by PG&E during this proceeding. The differences are explained here.

First, extraregional utilities do not receive Condition 2 access under section 5(d). Our reasoning for this distinction was explained earlier in this decision. However, during the course of the experiment, we anticipate that negotiations contemplated by section 6(b) of the LTIAP will proceed. If BPA and BC Hydro reach agreement on increased coordination of the two Columbia watershed systems, BPA might then be able to provide Condition 2 access to this extraregional utility. We take this prospect quite seriously.

Second, pro-rata allocations continue during Condition 1. This element seems less critical to California alternative proposals. PG&E's comments expressly provide that Condition 1 allocations be maintained. PG&E, #3-188, p. 35. CEC's first alternative proposal would permit pro-rata allocations — or even the complete exclusion of nonfederal sales — whenever prices were at or below our cost-based nonfirm energy rate. CEC, #3-218, attachment 1.

Retention of Condition 1 allocations is crucial to the enforcement of the Protected Area provision, described below. The Condition 1 decrement will provide an effective reason for utilities to refrain from building or acquiring hydro projects located in protected areas. The decision in *California Energy Commission v. BPA* makes it clear that we should take our fish and wildlife responsibil-

ities as seriously as antitrust policy and other concerns. This policy balances our numerous statutory obligations.

Also, retention of Condition 1 allocations gives every nonfederal utility some assurance of Intertie access when hydrological conditions might otherwise force them to spill. This was a critical concern of Northwest utilities, particularly the public generators. Tr. 386.

Third, section 5(d) makes no reference to share-the-savings pricing, which seems critical to the PG&E proposal. The fact that we are not resolving any pricing issues in this proceeding should not be read as a bias against share-the-savings. As explained later in this decision, we are open to the latest California suggestion regarding this pricing methodology.

Responding to other alternatives, neither of CEC's two proposals can be adopted. The first alternative, "restricted competition below cost," is far less competitive than any other proposal under consideration. It would give us complete control over spot-market Intertie transactions whenever we set our price at or below the cost-based rate we ourselves determined in the preceding BPA rate case. For reasons described earlier in this decision (pp. 52-54), this proposal carries serious "market manipulation" overtones. Ironically, this alternative seems inconsistent with the court's holding in the review proceeding initiated by CEC.

The second CEC alternative, "annual reconciliation," is well-intended but impractical. It would require us to monitor the relative benefits of nonfederal sales to California. We do not know the prices of these sales, not to mention resource cost information for both buyer and seller. Also, this approach would simply maintain controversy between BPA and California as an annual event. *See*

pp. 54-55, above. The theory behind CEC's second alternative could be implemented on a more practical basis if the Northwest and California can reach a consensus on share-the-savings pricing. We take up share-the-savings in the next section of this decision.

Finally, we respond to PG&E's "fully competitive when not spilling" proposal for Formula Allocation. The observations we expressed on p. 55-57 of this decision are pertinent here. This proposal is an overkill solution to the problem PG&E alleges. By PG&E's own study (corrected to include residential exchange burdens), it would cause BPA to lose up to $80 million per year to correct the problem attributed to pro-rata allocations. This would expose to excessive risk our responsibility to be "fiscally self-supporting." *California Energy Commission v. BPA,* 831 F.2d at 1475. In contrast, PG&E's "BPA-first" alternative is a more revenue neutral proposal which resembles the final section 5(d) we are adopting.

Section 3. Other Issues

ISSUE NO. 1: Should BPA renew efforts to establish share-the-savings pricing for spot-market transactions with Northwest and California utilities?

REFERENCE: This issue is not addressed in the policy.

A. *Proposal*

BPA's SS-87 share-the-savings rate is an alternative schedule available to any utility purchasing nonfirm energy from BPA. We make no new share-the-savings proposal in this proceeding. Resolution of ratemaking issues would be undertaken only in proceedings under Northwest Power Act section 7(i).

Several California utilities and regulators advocated share-the-savings pricing during informal discussions with BPA staff and again in their written comments. They believe that widespread adoption of this rate form might lessen the need for Formula Allocations under the IAP.

BPA endorses the concept of share-the-savings pricing and is willing to proceed towards widespread adoption of such a rate. While BPA is committed to exploring this pricing mechanism in good faith with California utilities, everyone should be aware that BPA has attempted unsuccessfully to implement these rates in the past with the same utilities.

B. *Summary of Comments*

Much of the discussion about this matter occurred during the extensive informal discussion phase of this proceeding. Among utilities that submitted written comments, SDG&E suggests that the LTIAP should give priority allocations to spot-market sales made pursuant to share-the-savings rates. SDG&E, 3-196, p. 3.

PG&E takes the lead on share-the-savings pricing in its written comments. Each of the alternative proposals discussed in the body of its comments and in the DFI appendix rely on this pricing mechanism.

SMUD supports the concept of such a rate "as the basis for establishing Northwest surplus non-firm energy rates." It does not support the use of a "share the savings rate formula as the basis for allocation of Intertie access." SMUD, #3-183, p. 4.

WAPA also encourages BPA to include "permissive language in the LTIAP that would allow adoption of this concept." WAPA, #3-189, p. 3.

Unlike other California parties, TANC does not support a provision in the final LTIAP that allows for a reassessment of the policy if a share the savings rate is developed. TANC states:

> TANC does not agree with the suggestion put forward . . . that the development of a share-the-savings rate is relevant to an allocation process for Intertie capability. Our concern is that if a share-the-savings concept were developed and coupled with Intertie access on the basis of matching lowest incremental cost power in the Northwest with highest decremental cost utilities in the Southwest in an effort to maximize benefits, then utilities in the Southwest with lower decremental costs such as TANC's members would risk not being able to access their own share of the Intertie. [TANC, #3-183, p. 2.]

From the Northwest, only DSIs offered comments on this question. During the public meeting of January 27, 1988, Mr. Durocher suggested that we again consider a share-the-savings approach to spot-market pricing. Tr. 823.

C. *Response*

We have stated a commitment to work toward implementation of share-the-savings pricing. However, to put this issue in perspective, it is wise to discuss the history of this rate form as a BPA pricing mechanism.

Between 1965 and 1974, the nonfirm rate to California was 2.0 mills per kWh, reflecting a static sharing of benefits between the Northwest and California's displaced 4.0 mill/kWh oil-fired generation. When California's oil costs rose to 15 mills/kWh, BPA increased its nonfirm energy rates to 3.0 mills/kwh in 1974. By 1979, when BPA adopted its "H-6" rate, California's alterna-

tive cost of oil-fired generation was between 30 and 40 mills/kwh.

The H-6 rate schedule incorporated a share-the-savings rate. The thermal displacement rate was based on both value-of-service and cost-of-service considerations. It allowed BPA to react to market and water conditions affecting maximum displacement of thermal resources both inside and outside the Northwest. It was priced at 50 percent of the buyer's decremental costs if the buyer purchased the power directly for use on its system or 33 percent of the buyer's displaced costs if the power was purchased indirectly through any Northwest utility. The rate for other sales was based on results from a cost-of-service analysis.

While we were considering adoption of the H-6 rate in 1979, legislation leading to the Northwest Power Act was debated in Congress. California utilities took the opportunity in Congressional hearings to protest the share-the-savings proposal in the H-6 rate because it was not cost-based. These utilities offered language that would have prohibited BPA from utilizing share-the-savings rates. *See* Pacific Northwest Power Planning, Hearings before the Subcommittee on Energy and Power, House Committee on Interstate and Foreign Commerce, 96th Cong., lst Sess., pp. 338-414 (1979). Congress rejected the utilities' substantive amendments and adopted procedural requirements for nonfirm rates found in Northwest Power Act section 7(k).

We adopted the H-6 rate for a two-year period. Although BPA had projected an average rate of 8 mills/kwh, California utilities actually purchased nonfirm energy at an average rate of 7.1 mills/kwh — displacing their 30-40 mill/kwh oil-fired generation. *U.S. Department*

of Energy, Bonneville Power Administration, 23 FERC ¶ 61,342, 61,739 (1983).

In 1981 and 1982 BPA adopted cost-based rates for nonfirm energy which did not contain share-the-savings components. When these rates were reviewed by FERC, the Northwest utilities argued that BPA should have based its NF-1 and NF-2 rates on share-the savings. However, California utilities and regulators opposed this suggestion and argued that a share-the-savings rate was unlawful.

FERC's administrative law judge found that a flexible share-the-savings rate could match market demands with the costs of supplying nonfirm energy. The judge held that there were no statutory limitations on the use of this type of rate. However, because BPA had not proposed it, no further consideration was required. *U.S. Dept. of Energy — Bonneville Power Administration*, 29 FERC ¶ 63,039 (1984). The Commission also declined to address the merits of share-the-savings rates. *See* 36 FERC ¶ 61,335 (1986).

In 1985, we adopted an experimental share-the-savings rates for sales of nonfirm energy. The "SS-85" rate had two components: an economy energy rate and a displacement rate. Purchasers whose decremental costs were equal to or greater than 24 mills/kwh purchased nonfirm energy under the economy energy rate at one-half their decremental cost plus six mills/kwh. Displacement rate purchasers had decremental costs less than 24 mills/kwh and purchased nonfirm energy according to a formula of the greater of 75 percent of decremental cost or 11 mills/kwh. Most Northwest utilities endorsed the SS-87 rate, while California utilities and regulators objected on statutory grounds.

In the spring of 1986, however, we initiated contract negotiations with the Los Angeles Department of Water & Power and Pacific Gas and Electric Company to explore their interest in an SS-85 contract. Although these discussions were informative, no contracts were executed.

In the summer of 1986 BPA continued informal discussions with California regulators concerning nonfirm rate "predictability." We conducted two workshops devoted to the share-the-savings pricing concept. It was our intention that the workshop would produce information useful in developing a new share-the-savings rate in 1987.

In 1987, BPA proposed a new share-the-savings rate, "SS-87." For the first time on the record, a California utility expressed an interest in a BPA share-the-savings rate. Pacific Gas and Electric Company supported a rate based on a 50-50 split of the seller's incremental costs and the buyer's decremental costs. BPA adopted an experimental SS-87 rate based on a formula to be negotiated between the buyer and seller subject to floor and ceiling prices. To date no sales have been made under this rate.

California Public Utility Commission claimed during our 1987 rate case that share-the-savings pricing was illegal — for BPA. However, in testimony before the House Subcommittee on Water and Power, CPUC president Stanley Hulett stated that California utilities were interested in pursuing the development of BPA share-the-savings rates. Oversight Hearing on Intertie Access Policy of the BPA: Hearing before the House Subcommittee on Water and Power Resources of the Committee on Interior and Insular Affairs, Part 1, p. 264 (May 7, 1987).

Share-the-savings rate implementation is also complicated by regional and public agency preference laws.

Against the mainstream Northwest position, Puget Sound Power & Light Company has maintained that a share-the-savings rate would violate the Northwest Preference Act. Of course, regional preference pertains only to the allocation of power and not to some preferentially low price, *Central Lincoln PUD v. Johnson*, 735 F.2d 1101, 1125 (9th Cir, 1984).

To sum up, we have had considerable experience negotiating share-the-savings rates with utilities simultaneously attempting to preserve litigation positions that BPA cannot offer such a rate. However, we are willing to try again if the legal posturing can be kept from interfering with practical issues about implementing such a rate. BPA continues to believe that this kind of rate promotes economic efficiency and equitable sharing of benefits of spot-market energy transactions.

ISSUE NO. 2: Should utilities with unused contractual or ownership rights to non-BPA transmission facilities be allowed access to BPA's portion of the Intertie regardless during Condition 3?

REFERENCE: 1987 draft policy § 3(d)
Final LTIAP § 3(d), § 5(c)(3)

A. *BPA Proposal*

The use-own-first provision in the 1987 draft required that utilities owning or controlling access to the Intertie fully utilize their transmission capacity prior to being allowed access to Federal capacity for spot-market sales.[23] Tr. 14.

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[23]This policy also applies to Assured Delivery service, discussed below.

B. *Summary of Comments*

During the public meetings in January 1988 and in the comment letters we received no specific comment on this issue. However, in informal meetings PP&L, one of the two present Intertie owners, suggested that the use-own-first provision not apply during Condition 3 when available Intertie capacity exceeds the sum of Northwest utilities' declarations. They maintain that under this condition utilities without ownership or control of Intertie capacity to California are not impacted by allowing owners to use the facility.

C. *Analysis and Decision*

The purpose of the use-own-first provision is to provide equitable access to Northwest utilities to a scarce resource. Utilities should use their own Intertie rights before using the Federal portion of the Intertie. Under Conditions 1 and 2 Northwest demand exceeds available Intertie capacity. Therefore, in order to maintain a sense of equity an Intertie owner must use its own Intertie first. This argument is not as strong under Condition 3, as Intertie capacity meets the demand of all Northwest utilities. We concur with PP&L that allowing access to any utility regardless of ownership status during Condition 3 will not deprive other utilities of Intertie capacity.

ISSUE NO. 3: Should the LTIAP incorporate a mechanism to dispatch the Northwest's coal-fired generating units on the basis of sulfur dioxide emissions?

A. *BPA Proposal*

The 1987 draft policy did not address this issue.

B. *Summary of Comments*

Northern Plains Resource Council, the Idaho League of Women Voters and the Northwest Conservation Act Coalition suggested that we use the LTIAP to force Northwest coal-fired generating units to be dispatched in inverse order to their sulfur dioxide (SO_2) emissions. The Conservation Act Coalition suggested that this alternative may be more economic than the way coal plants have been dispatched.

C. *Analysis and Decision*

Unlike the protected area concept which focuses on hydro projects yet to be constructed, SO_2 dispatch would involve us in the day-to-day operations of several existing coal plants in which we have no financial interest. Also, the protected area concept is attractive because it focuses directly on hydro development that could jeopardize our statutory investments in fish and wildlife. In contrast, Congress has not made our ratepayers a source of funds for air-quality improvements and we are not inclined to use the LTIAP as a mechanism for enforcing a well-intended, but impractical, SO_2 dispatch idea.

We performed an analysis to examine how a change from economic dispatch to SO_2 dispatch might affect Northwest export sales. *See* IDU EIS, Vol. 2, pp. 1-20 through 1-22. In this analysis, Northwest coal-fired plants were ranked on the basis of their average SO_2 emissions per kwh. The rankings were taken from "Burning Coal For Export: Environmental and Economic Dimensions of Northwest Intertie Sales to California" by Robert Watson, NRDC.

The plants were then dispatched in order of increasing SO_2 emissions per unit of electrical energy produced. The Colstrip plants had both the lowest costs and the lowest

SO_2 emissions per kwh. They were dispatched first. Valmy Units 1 and 2 have the second lowest SO_2 emissions per unit of electrical energy produced, but their costs are second only to Boardman. The SO_2 dispatch model blocks market access to other lower-cost coal plants in the Northwest. California buyers, who seek the lowest price, purchase less Northwest energy under SO_2 dispatch than under economic dispatch.

SO_2 dispatch generally caused reservoir levels to decrease. Of the four years analyzed in the IDU EIS, the largest decrease and the greatest impacts occurred in 1988. The greatest impacts were at Hungry Horse reservoir in the fall and winter months. Lower levels could harm resident fish and recreation.

Ideally, an "environmental dispatch" would consider all types of impacts, not just SO_2 emissions. Ranking generating resources of different types on the basis of their total environmental costs would require considerable effort and be fraught with controversy.

Further, for environmental dispatch to be feasible, there must be some mechanism for keeping power from Northwest generators competitive with California and Inland Southwest sources of power — which are not similarly constrained. Some agreement among utilities would be necessary to ensure that owners of lower-cost plants would still recover their investments in plants operated less frequently. Owners of higher-cost, cleaner plants would have to be able to recover their costs and receive a return on their investments even though the price of power sold from their plants might be too low to do so. We could not implement such arrangements unilaterally through the LTIAP.

Also, we might be forced to attempt some tracing of power from a generating unit to the Intertie — the LTIAP would not necessarily have an effect on power utilized within the Northwest. Yet, that would raise questions about whether units with high emission levels were being used within the Northwest so that "cleaner" resources could be exported.

This proposal is laden with complexities which the commenters have not addressed. Because of these complexities and the limitations of what we can accomplish through the LTIAP, we will not attempt to effect an SO_2 dispatch of resources. Such a proposal, if practical at all, could only be accomplished through a cooperative effort undertaken by coal-plant owners.

PART THREE

TRANSMISSION CAPACITY AVAILABLE FOR LONG-TERM FIRM TRANSACTIONS OF NONFEDERAL UTILITIES "ASSURED DELIVERY"

Section 1. TOTAL INTERTIE CAPACITY MADE AVAILABLE

ISSUE NO. 1: How much intertie capacity should BPA reserve for Assured Delivery transactions?

REFERENCE: 1987 draft policy § 4(d)(1)
Final LTIAP § 4(c)(1)

A. *BPA Proposals*

Under the LTIAP, "Assured Delivery" means firm Intertie transmission service provided under a BPA transmission contract to wheel power covered by a long-term firm contract between a Northwest scheduling utility and a Southwest utility. The Interim and Near-Term policies did not provide for Assured Delivery service. Then, in the 1986 draft LTIAP, we proposed to set aside a maximum of 420 MW to be devoted exclusively to the long-term firm power sales of Northwest scheduling utilities. The capacity limit was based on the then-current Pacific Northwest Utilities Conference Committee (PNUCC) forecast of firm power surpluses for each Northwest generating utility.

The 1986 draft policy reflected our conclusion that we could best serve the firm transmission needs of Northwest utilities by facilitating long-term sales of their surplus

firm power to the Southwest. We concluded then that nonfederal Northwest utilities, like BPA itself, were primarily interested in new long-term firm power contracts with California.

Before the 1987 draft policy was released, we conducted an informal survey of Northwest utilities to determine their needs for firm transmission. They increased our awareness that the long-term commodity market consists of more than firm power sales. The prevailing view expressed to BPA staff was that the transmission usage of choice was for seasonal exchanges — firm transactions that take advantage of seasonal diversity between Northwest and Southwest loads through transfers of firm power from north to south during the Southwest's summer load season and from south to north during the Northwest's winter load season. Tr. 5. However, there was also a strong minority opinion — espoused principally by MPC, Tacoma, and Cowlitz PUD — that firm power sales should continue to be accommodated.

In the 1987 draft policy, we increased the limit on Assured Delivery capacity from 420 MW to 800 MW. We divided that capacity between 444 MW available for wheeling firm power sales and 356 MW available for seasonal exchanges.

The 444 MW limit was based on the most recent PNUCC firm surplus forecast and a continuation of the Tacoma and Cowlitz agreements with WAPA. However, we increased the individual number for MPC from 80 MW to 105 MW as part of a proposed settlement to resolve any claims of MPC against BPA under Northwest Power Act section 9(i)(3), 16 U.S.C. § 839f(i)(3). Tr. 6. If this settlement — which has been encouraged by many Northwest utilities — is concluded, *Montana Power Co. v. BPA*, 9th Cir. No. 86-7330, will be dismissed with prejudice.

The new capacity limit carried two qualifications — one expansive, the other limiting. First, we committed to reassess this number to determine the amount of any additional Assured Delivery capacity when the third AC interconnection was placed in commercial operation. This offered the prospect of additional firm wheeling capacity when the physical capacity of the Intertie increased to 7,900 MW. Second, the 800 MW limit was also made subject to possible reduction if the DC terminal expansion project was not completed on schedule. These qualifications reflected a note of caution about possible BPA revenue losses under new features incorporated into the 1987 draft policy. We would prefer to test the final policy at the 800 MW limit before committing to any larger amount. Tr. 109.

800 MW Cost Analysis. We studied the lost revenues associated with providing capacity on a long-term basis for Assured Delivery of both firm sales and exchanges. This study was provided during the public meetings in January 1988 on the LTIAP. The analysis was done with the Systems Analysis Model (SAM). For the purpose of the study, Assured Delivery contracts were assumed to begin in 1989 and terminate in 2006. Two alternatives were studied: the first included the MPC firm power sale of 105 MW and 695 MW of seasonal exchanges; the second included the MPC 105 MW firm power sale, 440 MW of seasonal exchanges, and 255 MW of sales of other firm surplus power. The second alternative represents the more likely case under the policy, since we are setting aside 444 MW for potential firm sales including the MPC transaction. We anticipate that part of the 444 MW of capacity set aside for firm power sales will be utilized for exchanges.

The exchanges in the study were considered to be seasonal with energy flowing south in June through October and returning north during November through March. With the exception of the MPC firm power sale, the firm surplus sales were shaped 1.8 times the allowed capacity during the months of September through December.

In preparing the final LTIAP, BPA staff worked within the SAM study's second alternative in determining the effects on revenues. We estimated the load factor for seasonal exchanges to be 50 percent. However, we chose not to include BPA's estimate of lost revenue due to lost firm capacity sales. This decision was made because of the uncertainty of BPA's market efforts in this area. However, we can be relatively certain of the impacts on our nonfirm sales as a result of the LTIAP.

The analysis includes a calculation of mitigation impacts. These were based on the proposed Condition 1 mitigation and restriction on seasonal exchange cashouts. All returns were assumed to be at COB/NOB. For all north to south deliveries, under Condition 1 in the study a utility's Formula Allocation was reduced by the amount of its Assured Delivery. If the Formula Allocation was insufficient to cover the entire amount of its Assured Delivery contract, the utility was assumed to purchase the difference from BPA. The value of mitigation is estimated by determining the amount of overgeneration spill in megawatts up to 60 percent of the Assured Delivery under Condition 1. These megawatts are priced at the average price of Condition 1.

For all south-to-north deliveries during Conditions 1 and 2, we assumed BPA would receive revenues equal to 60 percent of the incremental benefits associated with serving the increased winter market. BPA's revenue pro-

tection due to mitigation is estimated to range from $62-$107 million depending on the alternative.

We assumed that if the system is constrained by supply there would not be any harm to BPA as a result of firm power sales. At all other times, BPA's loss is estimated to be 60 percent of the lost secondary revenues. In the case of exchanges, the study assumes that without mitigation we would incur 60 percent of the lost secondary revenues under all conditions during the summer and that BPA does not serve any of the increased winter return market.

Wheeling revenues were included in the consideration of net impacts on our revenues. Some commenters felt that BPA should not have to include the wheeling revenues in the calculation of the net impact. Without this calculation the net impacts would have been $154 million larger.

Without the mitigation, the net estimated revenue impacts, including lost nonfirm revenues and PF sales and the increase in wheeling revenues, was $200 million. After mitigation the net estimated revenue impact was $118 million, or an annual impact of approximately $9 million.

The following table is from the March update to the January SAM study already made available. (Wheeling revenues were revised in the update.)

ASSURED DELIVERY ANALYSIS
(from March 1988 revised SAM study, Table 5)

105 MW MPC Power Sale
440 MW Seasonal Power Exchange @50%
255 MW Firm Surplus Sale (Shaped)
800 MW Assured Delivery

Impact to BPA (1989-2006)
including Mitigation
$Millions 1987 (NPV)

	Alternative 2			
	(a) MPC Power Sale	(b) Seasonal Exchange 50%	(c) Firm Surplus Sale	(a+b+c) Total
1. Secondary Sales	(76)	(60)	(161)	(297)
2. Wheeling Revenues	25	60	69	154
3. PF Sales	—	(57)	—	(57)
4. Net Impact (1+2+3)	(51)	(57)	(92)	(200)
5. Mitigation	13	32	37	82
6. Net Impact w/Mit	(38)	(25)	(55)	(118)
7. Annual Cost w/Mit	(3)	(2)	(4)	(9)

B. *Summary of Comments*

There is no simple breakdown of comments on this issue according to region or nature of commenter. Our most recent proposal is supported by commenters in the Northwest and California, and by generating and nongenerating utilities. However, there are also strong views that 800 MW is either too much Assured Delivery capacity or not enough.

Our nongenerating utility and DSI customers generally oppose IAP provisions that would reduce the transmission capacity available for BPA sales either in the long-term or spot markets. Assured Delivery capacity made

available to generating utilities comes at the expense of revenue-producing transactions BPA could otherwise conduct over the Intertie. This can create upward pressure on BPA's rates. The DSIs summed up this concern by stating "[t]he mere fact that, at times, there is excess Intertie capacity does not impose on BPA an obligation to provide access at other times. BPA has the discretion, but no obligation, to provide such access. If it exercises that discretion, BPA must meet its statutory and other obligations, including its obligation [to] keep power rates as low as possible." DSI, #3-214, pp. 1-2.

EWEB commented that "BPA is correct to limit transaction amounts . . . on Intertie access for firm power sales and exchanges by nonfederal utilities." EWEB, #3-200, p. 1. EWEB states that this limit has a "direct economic impact on BPA's ability to market its surplus power, which must be maintained in order for BPA to continue to provide competitive Priority Firm rates and to meet its U.S. Treasury repayment obligations." EWEB, #3-200, p. 1.

While urging caution, our total requirements customers do not oppose strenuously the increase of Assured Delivery capacity from 420 MW to 800 MW. An essential condition to this support is the "mitigation measures" discussed later in this decision. NGPU states, "We accept as appropriate that amount, given full mitigation of losses to BPA." NGPU, #3-100, p. 4. APAC supports "BPA's expansion of the amount of Intertie capacity that is allocated to assured access for firm transactions if those transactions are mitigated in such a way as to minimize financial harm to BPA." APAC, #3-110, p. 1.

However, DSIs and nongenerating utilities alike resist any increase beyond 800 MW. For example, WPAG stated:

> The record contains no analysis to assess the potential revenue impacts to BPA of increasing the amount of Intertie capacity made available to nonfederal utilities beyond 800 megawatts. Further, BPA has declined to study what financial impacts BOO megawatts of Assured Delivery will have on BPA should the Third A.C. be delayed or not built at all. Without such analysis, and in the absence of any demonstrable need, it would be extremely imprudent for BPA to increase the amount of Intertie being made available for Assured Delivery. WPAG, #3-201, p. 6.

The proposal in the 1987 draft policy is also supported by publicly owned generating utilities in the Northwest and California. "The PGP has endorsed BPA's decision to limit the Assured Deliveries to 800 MW's because it demonstrates a commitment to the regional partnership mandated by Congress and essentially leaves BPA revenue neutral." PGP, #3-194, p. 1. SCL's reaction to the 800 MW number is that "it probably is adequate for today but . . . what the Policy needs is a commitment from Bonneville to when and if the 3rd AC is completed, to reopen that issue and look at whether that number might want to go up." SCL, Tr. 490.

Like Seattle, the California publicly owned utility membership of TANC expressed support for BPA's proposed limit. However, TANC also requests a commitment from us in the LTIAP to increase the amount of Assured Delivery when the COTP is operational and the transfer capability to the Southwest is increased. TANC, #3-182, p. 2.

Rather than focus on commercial operation of the third AC line, some commenters asked that the 800 MW limit be revisited after a trial run. For example, WUTC requested, "[W]e would like to see a provision in the final policy that commits Bonneville to *increasing* the allocation for seasonal exchanges if the impacts on the agency's revenue are found to be minimal, or if the impacts can be successfully mitigated." WUTC, #3-179, p. 2.

As a variant on the WUTC theme, PSP&L prefers that any future increase in the amount of Assured Delivery be tied to demand:

> The 800 megawatts of Intertie capacity for Assured Delivery referenced in the draft should not be an absolute limit. Rather, the LTIAP should specify that the amount of capacity made available for Assured Delivery will be reexamined with respect to increasing such amount at any time that requested capacity for Assured Delivery exceeds 800 megawatts. PSP&L, #3-117, p. 5.

ICP generally is supportive. It requests as an accommodation to generating utilities that we increase Assured Delivery capacity by an immediate 25 to 50 percent. "[I]nformal surveys indicate that it is not far from being sufficient; we suggest that a relatively small increase, say to 1000Mw or 1200Mw, might avoid the rush to complete contracts that might be caused by even a slightly inadequate quantity. . . ." ICP, #3-119, p. 10.

Two California investor-owned utilities approach the Assured Delivery limit from a different perspective. PG&E asks us to determine our own needs for firm Intertie capacity without regard to capacity needs for spot-market transactions and make the remaining physical capacity of the Intertie available for Assured Delivery.

"BPA has the statutory right to reserve a portion of its Intertie share to meet its reasonably foreseeable needs, but even if BPA is able to market all of its surplus firm resources it will still have approximately 2,000 MW available to provide Assured Delivery to utilities." PG&E, #3-188, p. 28. PG&E commented further that, "[t]he LTIAP would place an artificially low ceiling of 800 MW on all long-term firm transactions other than BPA's." *Id.*, p. 27.

Other California utilities found 800 MW too limiting. SCE commented, "BPA's proposal to provide only 800 MW of firm access is *both* arbitrary and inadequate. The 800 MW limit has no technical or operational basis." (Emphasis in original.) SCE, #3-187, p. 10. SCE would base the Assured Delivery limit on historical sales by BPA, using 1983 and 1976 as representative years in which BPA had two-thirds of sales over the Intertie. SCE concluded, "Even assuming that BPA intends to reserve two-thirds of the total Intertie for itself (total Intertie being 6200 MW), 2000 MW would be available for nonfederal use and even with Portland General Electric and Pacific Power & Light controlling 1000 MW, there should still be 1000 MW left for the other nonfederal Northwest utilities, not just 800 MW." *Id.*, p. 11-12.

At the other extreme, Big Bend and Umatilla cooperatives opposed the availability of any Assured Delivery capacity until the third AC transmission line goes into commercial operation. In advocating a "Federal first" Intertie policy that protects full-requirements customers, both utilities commented, "limited use by third parties may be appropriate if and when the third AC line is completed, but not before." Big Bend, #3-90, p. 1; Umatilla, #3-104, p. 1.

C. *Analysis and Decision*

There is no single method of computing the amount of Assured Delivery capacity that we can make available without seriously degrading our revenues. BPA staff and the PNUCC staff that reviewed our studies each concluded that it would be unwise to place too much faith in studies that are so dependent on assumptions regarding rainfall; load growth in California and the Northwest; and oil, natural gas, and aluminum price fluctuations. Tr. 8. BPA lost over $213 million in FY 1987; we do not want to exacerbate this problem with the final LTIAP. Tr. 54, 471-2. Given these uncertainties, we are understandably cautious about committing major portions of the Intertie for long-term nonfederal use and about the economic consequences of the set of new concepts incorporated into the 1987 draft policy.

Yet, the 800 MW upper limit in itself is a fairly dramatic departure from the past. It will facilitate a greater number and variety of firm transactions than before. Our studies indicate an annual revenue loss of approximately $9 million in lost nonfirm revenue and displaced firm power sales to our public agency customers. Tr. 7. The revenue effects on BPA have been quantified further in a study by PNUCC. Tr. 871-78; Study, Tr. 865-70. These adverse revenue effects, offset by mitigation measures discussed below, have been found acceptable by a fairly broad cross-section of commenters.

Given the judgmental element of this decision, it seems appropriate to look for possible consensus among the commenters. We must balance three basic objectives: Northwest generators' desire to sell or exchange power on a firm basis to California; our total requirements custom-

ers' concerns about rate stability; and our obligation to repay the Treasury.[24]

As we look for consensus, the PG&E proposal for committing 2,000 MW to Assured Delivery must be rejected as excessive. It ignores BPA's significant need to sell surplus nonfirm energy at certain times of the year to the California market. This need will exist regardless of how much surplus firm power we are able to sell, and Intertie capacity must be reserved to deliver it. Our nonfirm energy constitutes a "foreseeable" surplus for which Intertie capacity may be reserved. *Department of Water & Power,* 759 F.2d at 692.

We also have the authority to reserve excess Intertie capacity for non-Federal sales of nonfirm surplus, rather than allocating all of the excess capacity to firm sales. Some Northwest utilities that have hydro resources have only nonfirm surplus and only during certain times of the year. These utilities, as well as many of the utilities which have firm surplus or which desire to enter into seasonal exchanges, have need of Intertie capacity to make the best use of this nonfirm but valuable resource. In addition, given our decision on extraregional access, if PG&E's proposal were adopted, Canadian utilities might not receive any access to the Intertie. BPA believes it is in the best interests of the region, Canada, and California to reserve Intertie capacity for nonfirm sales rather than

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[24]Regarding the Treasury, it is important to bear in mind that the revenues we earn from Federal Intertie usage are critical to repaying the Federal government's $8 billion investment in the Northwest's Federal power and transmission systems. This investment was made with the expectation that it would be repaid, with interest, with revenues from our sales. We have the responsibility for establishing policies which ensure that sufficient revenue will be generated to cover all our costs, including planned repayments to the Treasury.

commit all of the excess capacity to non-Federal firm transactions.

Similarly, we reject the Big Bend and Umatilla objection to any amount of Assured Delivery. We believe these transactions can bring benefits to the Northwest and to California. Some may even bring benefit to BPA in the long run. We will provide non-Federal access to the Intertie if the adverse impacts on BPA are within an acceptable range.

Among the remaining comments, 800 MW — together with a commitment to reexamine when the third AC line is completed — reasonably satisfies nearly all expectations. Our total requirements ratepayers seem satisfied so long as the 800 MW limit is not exceeded without further study. Northwest generating utilities and WUTC are satisfied provided we undertake further study to review BPA's ability to provide, and Northwest utilities' demands for, incremental Assured Delivery capacity.

The fear of ICP, SCE, and PG&E about the possible inadequacy of 800 MW is not borne out by our recent negotiations with Northwest utilities expressing a concrete interest in firm power transactions with the Southwest. If each of these five transactions were consummated, they would utilize slightly more than half the 800 MW capacity limit over the next five years. But five years from now, the third AC line should be in commercial operation and BPA will have concluded its reassessment of the Assured Delivery limit. In short, our negotiations cause us to reject PG&E's proposition that the selection of 800 MW "would place an artificially low ceiling . . . on all long-term firm transactions other than BPA's."

Moreover, the LTIAP provides additional opportunity for utilities to enter into joint ventures that would allow BPA to market surplus power as part of three-party arrangements involving California utilities. Because of the power sales benefits flowing to BPA, Intertie capacity reserved for BPA's use will in effect be made available for such transactions. "If firm sales have not been consummated then the Joint Venture and firm displacement-type transactions which utilize federal access should be pursued." PGP, #3-194, p. 2. These provisions are discussed later in this decision.

We conclude that 800 MW is a reasonable limit on Assured Delivery capacity. Within this limit, firm transactions subject to the mitigation provisions of section 4(d) should not produce serious adverse revenue consequences for BPA. This conclusion is strengthened if scheduling utilities use Assured Delivery capacity for low load-factor exchanges more than for high load-factor sales. If mitigation provisions were not a part of the LTIAP, concerns about BPA revenues would have caused us to select a lower limit.

Section 4(c)(1) of the final LTIAP carries forward BPA's commitment to reexamine the limit on Assured Delivery capacity when the third AC transmission line goes into commercial operation. To ensure that this question is revisited regardless of the outcome of the third AC project, section 4(c)(1) will also provide that BPA will revisit the 800 MW limit if the third AC Intertie project is not completed. Our future decision on increased capacity will, of course, be tempered by scheduling utilities' willingness to abide by the revenue-protective measures of the final policy.

Studies discussed in the IDU EIS address the effects of making up to 800 MW of capacity available for non-

Federal firm transactions. These studies show a potential impact on resident fish and cultural resources under both the Federal Marketing case and the Assured Delivery case due to the potential changes in elevations at the Hungry Horse (Montana) hydro reservoir. IDU EIS, section 4.2.2-8. We are working with the Montana Department of Fish, Wildlife and Parks to evaluate and, if necessary, mitigate impacts to resident fish. We are also participating in funding surveys of cultural resources at the Columbia and Snake River Federal storage reservoirs to determine the need and methods for mitigating adverse effects on cultural resources.[25]

ISSUE NO. 2: How should the 800 MW set aside for Assured Delivery be allocated by utility and by type of firm transaction?

REFERENCE: 1987 draft policy § 4(d)(2)(B)
Final LTIAP § 4(c)(2)

A. *BPA Proposal*

In the 1986 draft LTIAP, each scheduling utility was allocated a portion of the 420 MW available for transmission of Northwest non-Federal firm power sales. Individual allocations, shown in "Exhibit B" to the draft policy, were based on each utility's share of the regional firm surplus.

Exhibit B does not provide surplus numbers for PGE or PP&L. These two utilities have their own Intertie capacity, which is larger than their average firm energy surplus. Consequently, because of our determination to

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[25]We would address these matters again before making any decision to increase Assured Delivery capacity beyond 800 MW.

reduce a utility's average firm energy surplus by its own Intertie capacity, neither utility is listed in Exhibit B.

By the time the 1987 draft policy was released, PNUCC's regional surplus estimate had declined to 320 MW. This new figure was augmented by extra capacity made available to MPC, for a new Exhibit B total of 361 MW. Individual scheduling utilities once again were to receive shares of the total.

As we attempted to accommodate demands for seasonal exchange transmission capacity, we came to the conclusion that exchanges cause less severe spot-market impacts on BPA than power sales for two reasons. First, these exchanges tend to be low load-factor transactions that utilize the Intertie for only eight to ten months per year (four to five months in each direction). Over the course of a year, BPA would dedicate less Intertie capacity to these transactions than to year-round, high load-factor sales, leaving more capacity available for Federal sales. Second, seasonal exchanges create a wintertime return energy market in the Northwest for which BPA and other Northwest sellers can compete if their prices are lower than the incremental costs of exchanging utilities in California. Tr. 62.

However, exchanges are not totally beneficial. They have two major disadvantages for the long-term marketing efforts of BPA and the Northwest in an era of surplus. First, exchanges eliminate access to the more lucrative heavy summer load-hour markets in the Southwest without decreasing the overall Northwest surplus. In fact, seasonal exchanges increase the Northwest's wintertime surplus by returning energy during the less-lucrative winter market, thereby increasing BPA's surplus and the probability of spill on the Federal hydro system. Second, exchanges bring energy back to the Northwest during

light load hours, thereby increasing operational problems. MPC, #3-111, pp. 3-4.

We believe that the disadvantages of exchanges tend to cancel out their benefits. However, to recognize the demand for seasonal exchanges, the 1987 draft policy made available an additional 440 MW of capacity. We proposed to allocate this 440 MW among Northwest utilities based on utility summer surpluses. No specific allocations were provided in the 1987 draft.

B. *Summary of Comments*

In addition to concerns about utility needs and BPA revenues, the comments indicate that there is a significant environmental issue at stake in this determination. Comments support the Exhibit B regional surplus limitation on sales of firm power. PGP stated, "We like the idea of the Exhibit B usage in a sense for limiting firm exchanges to the 360 megawatts for firm sales. We don't want people constructing resources to make firm sales." PGP, Tr. 383. In a similar vein NRDC commented, "The Policy includes a crucial common-sense safeguard that was missing from the earlier version: no utility can make long-term commitments to sell more surplus power than it now controls (section 4(d))." NRDC, #3-132, attachment p. 3.

PGE and PP&L both questioned BPA's calculations of firm surplus amounts in determining how much they should be allocated in Exhibit B. PGE suggests that it be allowed the total of its average firm surplus in the PNUCC Regional Forecast of 258 MW. PGE, #3-133, p. 4. PP&L calculated its own Exhibit B amount of 99 MW. PP&L, #3-138, p. 3.

Capacity available for exchanges. Inclusion of seasonal exchanges in the 1987 draft was well received. "Western commends BPA for its recognition of seasonal exchanges.

Such exchanges will benefit both regions as they make for the efficient use of resources." WAPA, #3-189, p. 3. "[W]e feel quite strongly that seasonal exchanges which result in a decreased need for the construction of new power plants at either end of the line should be facilitated to the maximum extent possible." Friends of the Earth, #3-203, p. 3. "[T]he promotion of transfers [exchanges] ... is ... a way of reducing environmental impacts through the construction of additional facilities." PSP&L, Tr. 481.

Criticism of the 1987 draft's proposal focused on the share of the 800 MW capacity limit devoted to exchanges. WAPA, #3-189, p. 3; LADWP, #3-192, p. 3; PG&E, Tr. 427; PSP&L, Tr. 55. A second criticism addressed limitations placed on the types of exchanges permitted. PG&E, #3-188, p. 84; SCE, #3-187, p. 14; SDG&E, Tr. 442.

ICP raised a definitional problem: how to distinguish between sales and exchanges when a firm sale may convert to a seasonal exchange. "[W]e continue to propose that the block of Intertie made available for nonfederal Assured Delivery be treated as a monolith. Most of the contracts completed or currently in negotiation cannot be clearly defined as firm power sales, firm capacity sales or exchanges." ICP, #3-119, p. 10

PPC recommended eliminating most distinctions between types of transactions. "[O]nce an amount of Assured Delivery is determined for the final policy, there should be no strict limitations within that amount regarding the split between power sales and exchanges, except to the extent that Exhibit B limits firm power sales." PPC, #3-125, p. 4. Similarly, WAPA and WWP requested that BPA remove the 440 MW limit for seasonal exchanges. WAPA, #3-189, p. 3. WWP believes that sea-

sonal exchange constraints based upon summertime firm surpluses are matters best left for resolution under the Pacific Northwest Coordination Agreement. WWP, #3-122, p. 21.

Types of exchanges. The term "exchange can refer to various transactions that take advantage of diversity between Northwest and Southwest loads through deliveries of firm power from north to south during the Southwest's peak demand times and returns of capacity and energy from south to north during other times. Transactions vary depending on the lag between deliveries and returns. A "naked capacity" transaction might require offpeak energy returns within 24 hours, whereas a capacity-energy exchange might require energy returns later during the same season.

There are no specific provisions in the 1987 draft policy that permit these types of exchange transactions. BPA staff simply did not perceive a demand for such transactions at the time the 1987 draft was released. BPA, Tr. 84. Comments from a cross-section of generating utilities recommended that BPA rectify this omission.

PG&E misread our intent, stating "[T]he LTIAP flatly prohibits valuable transactions by denying long-term firm transmission service for capacity-energy exchanges over BPA's share of the Intertie." PG&E, #3-188, p. 3.

SCE recommended, "Exchanges should not be restricted to just the seasonal variety. Northwest and California utilities will benefit from capacity-for-energy exchanges. . . . BPA should not prohibit capacity sales . . . nor should BPA rule out other transactions such as generating unit purchases and sales." SCE, #3-187, p. 14. These observations were echoed by California publicly owned utilities: "TANC recommends that BPA include

provisions in the policy for capacity-energy exchanges, peaking capacity sales, straight energy sales, and other reasonably foreseeable types of transactions in addition to seasonal exchanges and firm power sales." TANC, #3-182, p. 2.

SDG&E noted that "[a]lthough these types of contracts may not be viable now, to preclude them completely from a long term policy is short sighted." SDG&E, #3-196, p. 2.

In the Northwest, the publicly owned generating-utility members of PGP suggested that "provision for seasonal exchanges in section 4(d)(3) be expanded to include opportunities for a wider variety of transactions if those transactions meet all of the Assured Delivery and Mitigation provisions and would cause no adverse impacts on the operation of the northwest coordinated system. PGP, #3-124, p. 4.

C. *Analysis and Decision*

All California utilities find exchanges advantageous. In the Northwest, however, the balance between benefits and costs of exchange transactions depends on whether a regional or individual utility perspective is employed. From the regional perspective, which BPA is often encouraged to take, the Northwest has a year-round firm surplus. The time of possible vulnerability for serving Northwest regional loads is not the winter peak. Instead, it is the month of August when recreational constraints on reservoir drawdown can limit generation by the regional hydropower system. Tr. 6. From a regional perspective, the Northwest may not be advantaged by exchanges that draw on this system during the summer for deliveries to California and increase the wintertime

surplus with return energy from California. MPC, #3-111, pp. 3-4.

Individual Northwest utilities view exchanges differently. WWP and PSP&L face near-term winter needs. To utilities such as these, seasonal exchanges may be the lowest-cost incremental source of wintertime power. The flexibility of the coordinated Northwest power system may be used to shift any August delivery vulnerability to the region as a whole.

By and large, comments about exchanges came from utilities in the Northwest and California that would benefit from such transactions. The "Northwest regional" perspective was underrepresented. MPC was virtually alone in pointing out the possible shortcomings of these transactions.

From BPA's perspective, our key concern about exchanges is their possible adverse effects on summertime operational constraints. We have not been able to devise a generic solution to this problem. However, we are fairly confident that exchanges likely to be consummated under the 800 MW Assured Delivery limit should not cause operational problems during summer months. Proposed contracts will be reviewed on a case-by-case basis under section 3(c)(4) of the LTIAP to test this expectation.

The potential environmental effects of seasonal exchanges were addressed in the IDU EIS analyses. These studies indicated that, in combination with other types of power transactions, seasonal exchanges in excess of 500 MW have the potential to produce significant adverse effects on cultural resources surrounding Columbia and Snake River Federal storage reservoirs (*See* IDU EIS sections 4.2.2.3, 4.2.2.5). They may also have significant adverse effects on resident fish at Hungry Horse reservoir

(*See* IDU EIS section 4.2.3.3). If exchanges are increased beyond 700 MW, resident fish at Libby reservoir would also be adversely impacted. However, both the cultural resource and resident fish effects are being addressed through implementation of appropriate mitigation measures.

The final LTIAP includes a definition of "exchange" that covers a variety of transactions, including capacity-energy exchanges and naked capacity sales. This term has been substituted for "Seasonal Exchange" throughout the LTIAP. This change satisfies the concerns of California generating utilities and PGP, with no erosion of BPA revenues in comparison to provisions in the 1987 draft.

As for the limits on types of transactions, BPA is convinced of the wisdom of imposing Exhibit B limitations on firm power sales. From the standpoints of environmental quality and financial risks, it seems appropriate to limit Assured Delivery capacity to the amount of firm surplus presently available in the Northwest for export sales. NRDC, #3-132, p. 3; IDU EIS, S-8. BPA was uncertain in the last draft of the LTIAP where to include provisions for existing agreements for firm sales. Tacoma and Longview Fibre/Cowlitz have agreements with WAPA that total 86 MW. BPA has increased the Exhibit B firm surplus allocations to include these sales. (*See* discussion at Section 2, Issue 3.) This increases the Exhibit B firm surplus total to 444 MW. However, our discussions with utilities in the Northwest lead us to conclude that 444 MW is a high estimate of the amount of non-Federal firm sales likely to be consummated with Southwest utilities. Consequently, the environmental and economic impacts will likely be less.

In calculating the Exhibit B firm surplus allocations, we relied on data submitted by the utilities for the 1987

PNUCC regional forecast reflecting their 1988-89 requirements and resources. Using this data assures consistency and reliability in determining each utility's average firm surplus. In this submittal PGE had a firm surplus of 258 MW and 75 MW of export sales for a total of 333 MW. Since PGE currently has 700 MW of capacity in the Intertie, its entire firm surplus can be transmitted over its own capacity. PP&L's submittal to the PNUCC differs from the calculations in its comments to BPA on the draft policy. In the 1987 Regional Forecast PP&L had a firm surplus of 330 MW of which 67 percent or 221 MW is considered to be its regional amount. This amount combined with its export of 28 MW in the PNUCC Regional Forecast equals 249 MW. PP&L has rights to deliver 300 MW for sales to California at the Malin Substation; this right covers the 249 MW total.

We have concluded that Exhibit B amounts need not be used exclusively for firm sales. There is no apparent reason to preclude scheduling utilities from using their individual Exhibit B amounts for firm exchanges which, in the words of PGP, "meet all of the Assured Delivery and Mitigation provisions and would cause no adverse impacts on the operation of the northwest coordinated system." PGP, #3-124, p. 4. This modification should overcome the definitional problem discussed by ICP.

The final LTIAP does not allocate the remaining 356 MW of Assured Delivery capacity among scheduling utilities. That amount will be available for exchange transactions of scheduling utilities on a first-come, first-served basis. BPA has not allocated the remaining capacity based on individual utility summer surpluses due to the lack of information on which to calculate such allocations. Proposed contracts will be reviewed on a case-by-case basis under section 3(c)(4) of the LTIAP to deter-

mine their possible adverse effects on summertime operational constraints.

Section 4(c)(2) of the LTIAP provides that scheduling utilities may utilize their individual Exhibit B transmission capacity whenever they elect to enter into long-term firm transactions with Southwest utilities. This provision reserves the capacity for each utility with an Exhibit B amount and eliminates the concern of utilities about a possible "gold rush" effect if Assured Delivery contracts had to be negotiated by a specific deadline. However, after a reasonable period of experience we may utilize section 4(c)(3) of the final LTIAP to withdraw unused Exhibit B capacity from individual utilities. Any withdrawn capacity will be added to the 356 MW portion of Assured Delivery capacity to be made available to scheduling utilities on a first-come, first-served basis.

ISSUE NO. 3: Should the LTIAP resolve a controversy over alleged rights to firm Intertie wheeling of Montana Power Company's share of the Colstrip No. 4 coal-fired generating plant?

REFERENCE: 1987 draft policy Exhibit B Final LTIAP Exhibit B

A. *BPA Proposal*

In 1985, MPC offered the entire output of its Colstrip No. 4 share for acquisition by BPA. After BPA declined this offer for lack of need within the Northwest, MPC claimed priority under Northwest Power Act section 9(i)(3) to firm Intertie wheeling service for 210 MW of Colstrip. When that request was denied, MPC petitioned for review by the U.S. Court of Appeals for the Ninth Circuit. *Montana Power Co. v. BPA,* 9th Cir. No. 86-7330.

After preliminary negotiations with MPC in November, BPA included in the 1987 draft policy a proposal for resolving a controversy about firm wheeling of power from MPC's portion of the Colstrip No. 4 generating station. The proposal increased the amount of MPC's Exhibit B Assured Delivery capacity from 80 MW to 105 MW (one-half MPC's share of Colstrip No. 4 capacity).

B. *Summary of Comments*

The Governor of Montana supported BPA's increased allocation to 105 MW in settlement of obligations under section 9(i)(3) of the Northwest Power Act. If settlement could not be reached prior to finalizing the policy, he requested that "the IAP remain flexible enough to incorporate the terms of a later agreement, while allowing MPC to meet its existing sales obligations." Governor of Montana, #3-127, p. 1.

Vigilante opposed MPC's allocation of 105 MW of Intertie capacity and stated, "Our public utilities who are not now generating, but working on hydro and other resource development may well need this capacity in the near future. In the meantime, BPA should use this capacity in the most cost effective manner to maximize revenue." Vigilante, #3-140, p. 1.

PPC, an intervenor in the Ninth Circuit proceeding, insisted that "BPA should receive written assurances from MPC that this particular amount will indeed lead to settlement of the dispute." PPC, #3-125, p. 4.

EWEB commented, "Montana Power has shown no basis to be excused from costs of mitigation. The existence of a [section] 9(i)(3) resource in conjunction with BPA's legal requirements to wheel does not provide a basis for those costs to be paid by the Region." EWEB, #3-200, p. 3.

C. *Analysis and Decision*

It strains credibility to suggest, as Vigilante does, that BPA should deny Intertie access for existing needs so that Intertie capacity will remain available for resources yet to be developed. BPA does not intend to use the LTIAP to encourage resource construction for export. A utility's allocation for firm sales outside the region is based on its existing firm surplus which can be supported in the future with new resources but cannot be increased by acquisition of new resources. Furthermore, Vigilante should be especially aware of the fish and wildlife protected area restrictions on new hydro development before it considers new resources.

A common sense argument can be made for wheeling the settlement amount of Colstrip capacity because MPC's share of Colstrip is surplus to long-term Northwest needs. In addition to BPA's rejection of MPC's offer of Colstrip capacity, the Montana Public Service Commission has been unwilling to include the cost of that resource in retail rates, instead urging the utility to acquire other resources as Montana loads increase. Long-term firm export sales, such as the MPC sale, were analyzed in BPA's IDU EIS and no significant environmental problems were uncovered.

We have reached a settlement that will provide MPC with 105 MW of Assured Delivery capacity to facilitate a firm sale of the output of Colstrip No. 4. BPA and MPC have negotiated, contingent on implementation of the LTIAP, a series of main-grid and intertie wheeling agreements that require MPC to satisfy annual mitigation requirements for the life of the Colstrip sale. Also, MPC has agreed to a formula rate that will reduce the charges imposed on BPA by MPC for transfer service to our Montana loads. Finally, MPC will move to dismiss, with

prejudice, *Montana Power Co. v. BPA,* 9th Cir. No. 86-7330.

This settlement should meet the reasonable expectations of all who commented on the issue. Based on MPC's regional firm surplus, the IAP would have granted MPC 80 MW of Assured Delivery. MPC argued that it should receive 210 MW of Assured Delivery as a statutory right under section 9(i)(3). The additional 25 MW provided by BPA is an acceptable compromise settlement of litigation over a difficult issue with an uncertain outcome. If for any reason settlement is not reached, MPC's extra capacity will revert to other Northwest utilities for Assured Delivery service.

ISSUE NO. 4: Should conservation be included among the resources eligible for Intertie access under the LTIAP?

REFERENCE: 1987 draft policy — no reference
Final LTIAP § 1 #17

A. *BPA Proposal*

In the 1986 and 1987 drafts of the LTIAP, the definitions of "Qualified Northwest Resource" and "Resource" were limited to generating resources. Conservation is not mentioned.

B. *Summary of Comments*

Comments from a variety of sources pointed out the inequality of treatment of conservation compared to generating resources and in use of conservation as part of a marketing strategy. Mason, #3-87, p. 1.

NCAC complained that the draft LTIAP "does not so much as acknowledge the possibility of a generating or non-generating utility independently developing *conserva-*

tion resources and making a sales transaction based on the saving from those resources. We and others have been urging, for 5 years now, that such conservation-based sales were a necessary and proper element of a wise inter-regional sales strategy." (Emphasis in original.) NCAC, #3-206, pp. 3-4.

A study submitted with PG&E's comments concluded that the draft LTIAP would prohibit or discourage the realization and use of conservation for firm transactions. PG&E, #3-188, attachment p. 8.

Statutory concerns were pointed out by WPAG in a conflict between section 4(e) of the Northwest Power Act and the lack of provision for conservation in the draft LTIAP, while "permitting new generating resource development, including baseload thermal, to support export sales." WPAG, #3-123, p. 22.

NRDC stated that it does not want the policy to encourage building power plants instead of less expensive conservation. NRDC, #3-132, pp. 5-6.

On the other hand, PGP opposes consideration of Assured Delivery for any new resources "based upon potentials, future resources, conservation transfers or planned load reductions" until after the third AC Intertie is operational. PGP, #3-194, p. 3.

C. *Analysis and Decision*

We disagree with the comments which conclude that we are prohibiting or discouraging conservation by not including conservation in the definition of "Resource." A Scheduling Utility may support its continuing ability to meet its obligations under a firm export contract by implementing conservation on its system to defer or avoid the necessity to acquire new generation as its own load

increases. It becomes a question of the economics of conservation measures versus the economics of purchasing new generation. In no way does the LTIAP discourage or prohibit such an election.

A scheduling utility can also meet its obligations to serve its own load under the waiver requirement (section 4(a)(4)) by implementing conservation on its system rather than acquiring new generation. In no way does BPA insist that such load be met with new generating resources.

With respect to WPAG's comment about section 4(e) of the Northwest Power Act, that section applies to resources acquired by BPA. It does not apply to matters involving nonfederal resources or to BPA's transmission responsibilities.

We do not agree that nongenerating utilities can have a surplus to be exported. Defining conservation as the resource to be delivered over the Intertie would arguably allow utilities to sell to California power purchased under their BPA section 5(b) power sales contracts if an equal amount of conservation were implemented on their systems. We have consistently asserted that this result would violate section 5(b) of the Northwest Power Act and the provisions of the power sales contracts.

We also disagree with the notion that scheduling utilities could increase their Exhibit B amounts by implementing conservation or that utilities without Exhibit B amounts could create them by implementing conservation, as Friends of the Earth, WPAG, and Mason seem to argue. BPA has determined that it will provide a maximum amount of Assured Delivery for firm sales. That amount is based on the average firm surplus calculated from individual utility submittals in the PNUCC's 1987

Northwest regional forecast. The LTIAP does not provide for increasing that amount as a result of any future action, including conservation, that might increase the utility's firm surplus.

ISSUE NO. 5: How will access for nonscheduling utilities and computed requirements customers be provided under the LTIAP?

REFERENCE: 1987 draft policy § 1, definition II
LTIAP § 1, definitions 12 and & 18

A. *BPA Proposal*

The 1987 draft policy limited the definition of "scheduling utility" to the Northwest portion of a nonfederal utility that operates a generation control area in the Northwest. Exhibit B tends to blur this definition. Cowlitz and EWEB, which are computed requirements customers, have Exhibit B amounts even though they do not qualify for an Exhibit B amount under the definition. "Nonscheduling utilities" must request Intertie access through the scheduling utility (or BPA) in whose control area a resource is located.

B. *Summary of Comments*

Cowlitz would expand the definition of "Scheduling Utility" to include "any utility within BPA's generation control area that has non-federal generating resources and which is designated as a Computed Requirements customer." Cowlitz, #3-129, p. 1. EWEB and PGP recommended the same change. EWEB, #3-137, p. 2; PGP, #3-124, p. 3.

PNGC's members are total requirements customers of BPA. They own 50 MW of the Boardman coal-fired generating station. PNGC recommends that section 4(c)

clarify that nonscheduling utility access will be provided via Intertie capacity reserved for BPA. PNGC, #3-141, p. 3.

C. *Analysis and Decision*

We agree with Cowlitz that the definition of "Scheduling Utility" should be revised to include BPA's computed requirements customers. This is consistent with previous policies and clarifies treatment of computed requirements customers under the LTIAP.

Nonscheduling utilities will continue to be required to make Intertie arrangements through the utility who has control over their generation or directly with BPA. If the nonscheduling utility acquires access, such access would utilize Intertie capacity reserved for BPA.

ISSUE NO. 6: Should BPA maintain provisions for joint ventures and, if so, should BPA make the provisions more detailed?

REFERENCE: 1987 draft policy § 4(c)
Final LTIAP § 4(b)

A. *BPA Proposal*

In the 1987 draft policy, BPA identified two types of transactions outside Exhibit B limitations: joint ventures with BPA and sales in lieu of exchanges. These are means of obtaining Assured Delivery in excess of the capacity limitation contained in the LTIAP. Such transactions would provide BPA with opportunities to sell its surplus power. Under joint ventures, BPA and scheduling utilities would each sell surplus power to California utilities. In a sale in lieu of exchange, BPA would sell firm power to a Northwest utility in need of winter capacity and

provide that utility with Assured Delivery to deliver power to the Southwest during summer months.

B. *Summary of Comments*

WAPA found the proposal for joint ventures attractive. "We support the Joint Venture proposal since it would allow recoupment of funds spent by Western on transmission facilities through economically advantageous resource purchases to support Western's Central Valley Project loads from Midwest purchases . . . ." WAPA, #3-189, p. 3.

PG&E was concerned about the clarity of potential mitigation measures for joint ventures. It stated, "[w]e have no problems with joint venture in general, but we are very suspicious that what BPA has in mind is mitigation measures and other payments . . . which will make those exchanges extremely expensive . . . ." PG&E, Tr. 428.

C. *Analysis and Decision*

We maintain provisions in the LTIAP for joint ventures and sales in lieu of exchanges. Our objective is to make additional sales of surplus energy or engage in other transactions that can increase BPA's revenues. Additional sales of Federal surplus should make additional Intertie capacity available to others. However, we do not intend for this LTIAP provision to predetermine the outcomes of individual negotiations. The terms of these arrangements will be determined case by case. Obviously, in such situations all parties to a joint venture must propose terms that are mutually agreeable. If PG&E is not satisfied with BPA's terms in any joint venture proposed for its participation, the transaction obviously would not occur.

These transactions are outside the limits of Exhibit B, providing an additional opportunity for utilities to gain access for firm arrangements. They also provide a means for utilities who have rights to their own Southwest interconnections to obtain capacity for firm transactions over BPA's capacity.

Section 2. Conditions on Assured Delivery Access

ISSUE NO. 1: Should the LTIAP require scheduling utilities to waive BPA's obligation to serve their loads in return for Assured Delivery capacity to facilitate long-term export sales?

REFERENCE: 1987 draft policy § 4(b)
Final LTIAP § 4(a)(4)

A. *BPA's Proposal*

Section 4(b) of the 1987 draft policy requires a waiver of our contractual obligation to serve a utility's load growth up to the amount of any firm power sale receiving Assured Delivery. The provision would prevent a scheduling utility from utilizing its BPA power sales contract to shift the burden of new resource development to BPA and our customers in the event that utility "oversold" its firm surplus for export to California. The provision applies only to sales, not to exchanges.

B. *Summary of Comments*

NRDC provides support for our proposal. "The ability to draw on the region's credit when deals go bad is an invitation to negotiate imprudent power sales. The problem is an unintended outgrowth of the power sales contracts that BPA executed with all Northwest utilities

back in 1981; the solution appears in section 4(b) of the proposed Policy . . . ." NRDC, #3-132, p. 3, attachment. *See* NWPPC, #3-139, p. 2.

While NRDC advanced an environmental argument, NWPPC presented the views of BPA customers whose rates might bear the cost of any resources BPA might acquire in the absence of LTIAP section 4(b). "We support . . . section 4(b) of the revised policy, which we understand to incorporate the requirements of sections 9(c) and 9(d) of the Northwest Power Act. This provision should avoid a situation where Bonneville must acquire new resources to serve loads that had been served by resources that were sold outside the region." NWPPC, #3-139, p. 2. *See also* Mason, #3-87, p. 1.

The generating utility members of PGP requested that BPA add a qualification to the end of section 4(b), making the waiver dependent on future events. "A scheduling utility will receive Assured Delivery for firm sales if it agrees to waive BPA's obligation to serve that scheduling utility's firm load under its Power Sales Contract up to the amount of power given firm Intertie access if BPA is substantially impacted when BPA reaches load/resource balance." PGP, #3-124, p. 5. The non-generating utility membership of WPAG, on the other hand, requests a strong provision without qualification. WPAG, #3-123, p. 11.

MPC requested special dispensation. "Montana Power has already met its responsibility by offering the resource to the region, that is why Colstrip Unit 4 is a section 9(i)(3) resource. By offering that 210-megawatt resource to the region, Montana Power has already firmed up its future resource requirements that it might place on BPA and, therefore, the provision that a utility must waive its right to place load requirements on BPA if it

sells power out of the region should not apply to any power which is being sold pursuant to section 9(i)(3)." MPC, #3-212, p. 2.

C. *Analysis and Decision*

The waiver of service obligation contained in LTIAP section 4(a)(4) addresses hydroelectric and non-hydroelectric resources separately. It is a component of the mitigation BPA requires for providing Assured Delivery service. Moreover, the provision has statutory bases.

With respect to exports of Northwest hydroelectric resources, a reduction of power supplied under the BPA power sales contract is statutorily required under the nonpermissive language of section 3(d) of the Northwest Regional Preference Act, 16 U.S.C. § 837b(d). For example, Tacoma has a sales agreement with WAPA covering hydroelectric resources that make up the "SCBID project." An Assured Delivery contract covering this sale would contain a provision for waiver of BPA's service obligation during the period of the sale. Under the Regional Preference Act, Tacoma must submit a new firm resources exhibit and assured capability exhibit to its power sales contract indicating the monthly obligation of energy equal to its export sale.

Thermal exports are covered by Northwest Power Act section 9(c), 16 U.S.C. § 839f(c). Section 9(c) grants the Administrator more discretion than section 3(d) of the Regional Preference Act.

PGP's qualification would only create confusion both at the time of a sale and later when an exporting utility approached us with a request for power. BPA must protect itself and our customers from any new resource obligations triggered by the export decisions of Northwest utilities. We are making a determination that utili-

ties can conserve their surplus resources to serve future load through withdrawal provisions, transformation into exchanges, or other methods.

This is not to say that we would be precluded from serving loads of utilities that make export sales. However, such a decision would be at our option, based on consideration of factors such as net revenues, effects on our other customers and any environmental concerns.[26]

An unusual situation is presented by Cowlitz, which has an agreement with WAPA covering a thermal resource owned by Cowlitz's retail customer, Longview Fibre. Longview Fibre, sold its resource to WAPA. The waiver does not apply to Cowlitz for this transaction. Assured Delivery service would provide for wheeling this resource from Cowlitz's system to WAPA.

We do not agree with MPC that the offer of a section 9(i)(3) resource, or any other resource, to BPA should excuse the offering utility from the provisions of section 4(a)(4). Section 9(i)(3) provides only for a priority to available BPA services. It does not exempt the utility from any applicable policy or legal requirement. MPC's argument would put us in an untenable position: either (1) buy the offered resource, even though we have a large surplus for some years to come, or (2) reject the offer, thereby committing to serve the utility's load growth that could have been served by the exported resource, even after we reach load-resource balance. MPC's argument would eliminate BPA's protection from

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[26]Analyses in section 4.4 of the IDU EIS indicate that nonfederal utilities would develop coal-fired and, to a lesser degree, small hydro generation. Federal resource development would focus on completion of Washington Nuclear Project Nos. 1 and 3 before coal or hydro generation.

the adverse effects of long-term exports of nonfederal power resources.

Colstrip No. 4 was offered to BPA only after the Montana Public Service Commission showed an unwillingness to permit MPC to recover the costs of this resource. Instead, the commission seems inclined to have MPC provide for future load growth from other resources, including the spot market. For the moment, the commission seems to have determined that Colstrip No. 4 should not be considered as a resource needed to meet regional loads. Hence, MPC's proposed export sale may have no effect on future decisions concerning resources needed to serve Montana loads.

We do not ask MPC shareholders to absorb the costs of this idle resource by forgoing export sales. However, the problem is not of BPA's making. The region — through BPA's customers — should not be asked to absorb the cost if future events demonstrate that the commission should have dedicated Colstrip No. 4 to Montana retail loads. After LTIAP section 4(a)(4)(B) is applied to MPC's 105 MW Assured Delivery contract, decisions about future resource costs will lie exclusively with MPC and the Montana commission (unless those decisions were to trigger a new application for residential exchange benefits).

In addition to the provisions for waiver of service obligation under the LTIAP, BPA is including in its Assured Delivery agreements a provision for termination of the agreement if the utility does not comply with waiver of service requirements. This should provide an additional measure of assurance that resources sold outside the region will not impact regional energy requirements, particularly after BPA is in load-resource balance.

ISSUE NO. 2: Should utilities owning or controlling interconnections to the Southwest be required to utilize such capacity before requesting Assured Delivery capacity from BPA?

REFERENCE: 1987 draft policy § 3(d), 4(a)
Final LTIAP § 3(d), 4(a)(2), 5(c)(3), Exhibit B

A. *BPA Proposal*

Section 4(a) of the 1987 draft policy requires utilities to utilize their own Southwest transmission access before requesting Assured Delivery service. This requirement is in part implemented by decrementing a utility's regional surplus by the amount of the transmission capacity to the Southwest. Read in conjunction with the 1987 draft policy's definition of "Assured Delivery," this use-your-own-first requirement would apply to all interconnections, existing or future, regardless of the market served. Our intent was to make Assured Delivery service available primarily to utilities that lack interconnection capacity and therefore depend on BPA for access to the Southwest. Tr. 13.

This issue has five discrete components. First, should the requirement be adopted at all? Second, should the requirement apply to all Southwest interconnections or to only the Southern Intertie? Third, should it apply only to capacity owned or controlled as of the date an Assured Delivery request is received; or retroactively to curtail existing Assured Delivery contracts when a utility acquires new interconnection capacity? Fourth, should the requirement distinguish between the different markets served by different transmission lines? Fifth, should "use-your-own-first" apply to joint ventures with BPA?

B. *Summary of Comments*

WPAG states two reasons why a utility with its own interconnection would seek Assured Delivery service: "First, it may wish to reserve its Intertie capacity for other transactions, such as spot market sales. And, second, it may be that its Intertie does not connect it to a viable market, and it is only by use of the federal Intertie that it can reach interested buyers." WPAG, #3-200, p. 7. WPAG argues that neither reason is sufficient to relieve a utility from the use-your-own-first requirement. *Id.*

NGPU argued for retroactive application of section 4(a), "if . . . utilities gain additional access through Third AC ownership their assured access through the existing BPA Intertie should be reduced an equal amount." #3-100, p. 4.

PGP supports section 4(a) "applicable only to the existing Intertie and shall not affect ownership or access of the 3rd AC line or other future transmission investments." PGP, #3-124, p. 5. In later comments PGP stated, "We recognize the appropriateness of allowing "swaps" between AC and DC access and encourage BPA to utilize this option when appropriate." PGP, #3-194, p. 3.

PGE is a co-owner of facilities in the existing AC Intertie. Its concern relates to a perceived inability to reach markets accessible only over the DC Intertie, without first utilizing its AC capacity to other markets. PGE, #3-198, p. 2. PGE also requested a clarification of whether section 4(a) would require a scheduling utility to utilize its own Intertie capacity for joint ventures. PGE, #3-133, attachment, p. 3.

Similar comments were filed by PP&L, which has firm delivery rights at Malin Substation for transactions on the AC Intertie:

> The LTIAP is not market specific, and provides better market access to non-Intertie owner utilities than to utilities with Intertie ownership or rights .... This policy would unreasonably discriminate against Pacific, which has agreed to contribute its underutilized Intertie rights to the allocation process *without compensation of any kind."* [Emphasis in original.] PP&L, #3-138, p. 1.

PSP&L comments, "The draft LTIAP's requirement that utilities use other transmission paths to the "Southwest" before receiving any Assured Delivery penalizes the development of transmission and unlawfully discriminates against utilities owning such transmission." PSP&L, #3-117, p. 12.

The Governor of Oregon supports the intent of section 4(a); however, he recommends "a compromise that recognizes the complexity of the market and the physical network of AC and DC lines." The Governor suggests that "a utility should use its own intertie capacity first but with respect to each Southwest customer, not the entire Southwest market." Governor of Oregon, #3-134, p. 2.

WWP generally favors the provision, but states, "this consideration should be prospective only and should not involve a decrement of firm Intertie capacity already under contract." WWP, #3-122, pp. 12-13.

This concern was also expressed by the CEC, who recommended that to provide long-term planning certainty for utilities with Assured Delivery agreements, BPA should apply the condition of "use your own first"

only to interconnections in existence at the time an agreement for Assured Delivery is provided, not retroactively to utilities that may acquire interconnection rights or ownership after receiving an agreement for Assured Delivery from BPA. CEC, #3-218, p. 61.

Northwest utility regulators also oppose section 4(a). WUTC commented that the provision "may not promote cost-effective seasonal exchanges." WUTC, #3-92, p. 3. IPUC argued that "this would be an impossible condition to enforce and [we] recommend that BPA drop it." IPUC, #3-116, p. 4-5.

C. *Analysis and Decision*

We address each of the five component issues in turn: need for the provision, scope of the provision, prospective versus retroactive application, distinctions between markets, and application to joint ventures.

Need for the provision. The two existing nonfederal Intertie owners argue that the provision is unduly discriminatory. To sustain this proposition they must demonstrate that there is no material distinction between Intertie owners and nonowners for purposes of this issue. While owners and nonowners may have similar aspirations to engage in firm power transactions over the Intertie, the distinctions between them is significant.

Owners have immediate access to their transmission capacity for profitmaking transactions. Any BPA Assured Delivery service to owners is cumulative of their Own Intertie capacity, but a reduction of the firm wheeling available to nonowners. The nonowners are totally dependent on BPA for access; other Intertie owners do not provide long-term firm wheeling to them. More liberal access to BPA's Intertie could allow owners to capture more of the spot market over their Intertie shares while

using up capacity on BPA's system at the expense of nonowners. Both effects can adversely affect BPA and its marketing program (*see* Part Two, Section 3, Issue 2).

It is likely that BPA would be told to use its own capacity first if it approached either PP&L or UPL for firm wheeling. In testimony before the Federal Energy Regulatory Commission on the proposed UPL-PP&L merger, UPL Vice President Verl Topham listed 16 preconditions that must be satisfied before the companies would consider providing wheeling service. Condition No. 14 is "[w]hether the party requesting the service has other reasonable opportunities available to it through other transmission paths . . . ." Topham Rebuttal Testimony, p. 50, *Utah Power & Light Co.,* Docket No. EC88-2-000 (February 24, 1988).

PP&L's claim that it has, without compensation, made its unused Intertie rights available to BPA for use under the LTIAP requires clarification. PP&L obtained 300 MW of firm delivery rights at Malin Substation as part of a general settlement of a contractual dispute and resolution of issues involved in the third AC line. Though PP&L's unused Intertie rights revert to BPA at no charge, BPA paid for this with other compromises throughout the complex arrangement.

Our primary concern in resolving this issue is to balance the needs of nonowners for firm Intertie access against the concerns of BPA and its customers about revenue impacts. BPA is providing a maximum of 800 MW of Intertie capacity to reach this balance. The concerns of owners are secondary for the reasons stated above. The LTIAP makes Assured Delivery service available to owners; however, they will be required first to utilize their own capacity for firm transactions. This conclusion is tempered by opportunities for joint ventures

and transmission swaps available to Intertie owners. These options, available on a case-by-case basis, are discussed below. BPA will apply this requirement on a fair and nondiscriminatory basis. As explained below, if other utilities acquire Southwest interconnections in the future they too will be subject to the same requirements to use their capacity prior to obtaining additional Federal Intertie access. Their remaining regional surplus will also be decremented by the amount of their Intertie capacity to arrive at their Exhibit B amount.

Scope. We agree with the Idaho PUC that the draft proposal, which applies to all interconnections, would be difficult to enforce. We have no practical means of monitoring flows over Southwest interties east of the Cascades, a system controlled largely by Utah Power & Light Co. To rely on UPL representations about use of eastern Interties virtually guarantees ambiguities, which we would have no practical way of resolving.

Yet, it seems unfair to exempt UPL — either now, or after consummation of its proposed merger with PP&L — from the use-your-own-first requirement. UPL has substantial interconnection capacity, which should be sufficient for its Southwest marketing needs. As we understand it, enhanced Southwest market access is a major reason, if not the most important reason, UPL and PP&L propose to merge. Our solution, therefore, is to rewrite the LTIAP definition of "Scheduling Utility" to exclude the owner of this eastern system. The definition will contain the following addition: "the term excludes Utah Power & Light Company, either as a separate corporation or as a division of another corporation, because it has sufficient transmission capacity to the Southwest without access to the Federal Intertie."

This has been BPA's practice under earlier versions of the LAP. However, the change will not preclude Intertie access for UP&L. We leave open the possibility of transmission swaps or joint ventures between BPA and UP&L, discussed below, if commercially attractive terms can be negotiated.

The possibility still exists that interconnections may be constructed and agreements may be executed for rights to capacity in interconnections with the Southwest that can be monitored. An example of this is the PP&L right to construct and utilize parallel paths in Southern Oregon and Northern California, for sales to California up to a total of 300 MW. BPA would require PP&L to utilize its own interconnections unless PP&L should agree to swap capacity or negotiate a separate arrangement with BPA such as a joint venture. We do not want to limit the use-your-own-first policy to BPA's existing or expanded Pacific Northwest-Pacific Southwest Intertie if either PP&L or any utility constructs a parallel facility to BPA's Intertie. This provision will remain in the LTIAP.

Prospective vs. retroactive application. WWP makes a compelling argument against retroactive application of section 4(a), interpreted consistently with the proposed definition of "Assured Delivery." If retroactivity were the rule, any utility with (1) an Assured Delivery contract and (2) an interest in constructing transmission capacity to the Southwest would face the prospect of constructing incremental capacity for both its new transactions and its existing contracts transmitted over the Federal Intertie. This result, which could frustrate the construction of new transmission capacity, does not seem necessary to achieve the basic purpose of the use-your-own-first concept. Also a consideration in our decision is the CEC's concern regarding the uncertainty in long-range planning if Assured

Delivery contracts were subject to retroactive application of the "use your own first" condition. The provision on retroactive reductions is excluded from the definition of "Assured Delivery" in the final LTIAP. However, utilities obtaining new transmission capacity to the Southwest must use that capacity prior to obtaining additional access to BPA's Intertie.

Distinctions between markets. There is an incomplete overlap between the markets served by the AC and DC Interties. PGE and PP&L, with ownership limited to the AC lines, observe that the use-your-own-first requirement might block their use of Assured Delivery capacity to markets served by the DC Intertie if they had not first utilized all their respective AC capacity. While this observation about the 1987 draft policy is correct, the solution is not to give PGE or PP&L more Assured Delivery capacity at the expense of nonowners. Instead, we will consider swaps of BPA's Intertie capacity for that of PGE or PP&L offered at commercially attractive terms. Intertie swaps and joint ventures provide another possible means of utilizing BPA's Intertie capacity, unconstrained by Assured Delivery capacity limitations in the LTIAP.

Joint ventures. Joint ventures will be negotiated in arms-length bargaining, with this issue being resolved on a case-by-case basis.

ISSUE NO. 3: How should existing Intertie wheeling contracts be treated under the LTIAP?

REFERENCE: 1987 draft policy § 4(d)(2), Exhibit C
Final LTIAP § 4(e)(2)(A), Exhibit B

A. *BPA Proposal*

Exhibit A to the 1987 draft policy would extend Assured Delivery service for the remaining terms of two seasonal exchanges involving WWP and California utilities. This service is also provided until 1990 for a firm power sale from Basin Electric Cooperative to WAPA. Tacoma and Longview Fibre and Cowlitz have existing agreements with WAPA also. However, their agreements were tied to the finalization of a LTIAP.

B. *Summary of Comments*

Basin requests that BPA consider an extension of its contract with WAPA, "if it is in the best interest of the parties," to enable WAPA and BPA to utilize their investments in transmission facilities through the state of Montana. Basin, #3-101, p. 1.

Longview Fibre and Cowlitz have an agreement with WAPA for a 45 MW firm sale of the output of Longview Fibre Corporation's cogeneration facility. Continued wheeling is dependent on the outcome of the LTIAP. Cowlitz has requested BPA to grandfather this contract under the final LTIAP. Cowlitz, #3-129, p. 2.

Tacoma also has an agreement with WAPA with continued access tied to the implementation of the LTIAP. Tacoma comments that if this agreement had not been made with WAPA the region's surplus would have been greater and BPA's revenues would have been reduced due

to Tacoma displacing the load it put on BPA. Tacoma, #3-130, p. 2.

WWP asserts that with appropriate operational mitigation its existing agreements with SCE and SDG&E should be renewed. WWP, #3-195, p. 7.

C. *Analysis and Decision*

BPA will increase the Exhibit B amounts for scheduling utilities Tacoma and Cowlitz so that their firm sales to WAPA may continue to receive Assured Delivery service throughout their remaining terms. Our grandfathering of these agreements protects BPA's revenues from priority firm sales to Tacoma and Cowlitz of approximately $19 million annually. This amount clearly exceeds any mitigation that might be imposed at an estimated value of approximately $1.5 million annually.

Firm access for the Basin/WAPA power sale will be provided from BPA's remaining capacity until 1990. We agree with WWP that with appropriate mitigation its agreement may be renewed if the agreements conform with the provisions of the LTIAP.

ISSUE NO. 4. Is the requirement for return of seasonal exchanges at COB/NOB a negotiable mitigation item?

REFERENCE: 1987 draft policy § 4(d)(4)(B)(i)
Final LTIAP § 4(a)(5)

A. *BPA Proposal*

The draft policy required energy returns under seasonal exchanges to the California/Oregon border (COB) or the Nevada/Oregon border (NOB). This was initially included in the mitigation provisions for seasonal exchanges. At that time we anticipated that the operational

mitigation measures were the only mitigation measures for seasonal exchanges.

B. *Summary of Comments*

PSP&L viewed the requirement as a measure imposed by BPA to enhance revenues which could result in generation in the Southwest supplanting less expensive generation in the Northwest. PSP&L, #3-117, pp. 7-8.

PG&E was also concerned with the revenue implications of COB/NOB return requirements, and stated the increased revenues would not only accrue to BPA but also would create an unjust "windfall" to other Northwest utilities. PG&E, #3-188, p. 30.

WAPA expressed concern about operational problems as well as costs, especially if the return is "during a time when the Northwest does not need the energy, in effect, exacerbating spill conditions." WAPA, #3-189, p. 2.

C. *Analysis and Decision*

BPA needs the certainty of available Intertie capacity resulting from return requirements at COB/NOB. For this reason, we include this provision in LTIAP section 4(a)(5) as a standard requirement for all exchanges.

We do not view the obligation to return exchange energy at COB/NOB as mitigation. The definition of Intertie Capacity relies on a total available north to south capacity that is *not* diminished by the deletion of return schedules. Operationally this means that BPA is able to allocate Intertie capacity effectively and provides the potential for an increased market. All Intertie users benefit from the certainty of available capacity for allocation.

SDG&E asked for clarification of the COB/NOB requirement, asking if it was mainly for wheeling revenue or for counterscheduling. SDG&E, Tr. 100. We replied that it provided both. BPA, Tr. 101. While this may increase wheeling and power sales revenues as a result of the increased market potential, the increased capacity also means that California will have the opportunity to buy more energy from the Northwest when it is cost effective for them to do so. The fulfillment of WAPA's concern about increased incidence of spill would be unlikely because the "present rates are designed to allow us to expand our marketing in these over-supply conditions". Tr. 36.

ISSUE NO. 5: What provisions for Assured Delivery will be made for extraregional utilities, including Canadian utilities, in the policy?

REFERENCE: 1987 draft policy § 1.14., § 6
FINAL LTIAP § 1.15, § 6

A. *BPA Proposal*

For extraregional access for firm transactions the draft policy required that the utility must provide some benefit to BPA, such as increased storage, improved system coordination or operation, or other consideration of value. In addition, the utility must agree to the mitigation provisions of the policy. Canadian utilities were required to wait for access until after the Intertie was rated at 7900 MW.

B. *Summary of Comments*

California utilities did not want extraregional access to be delayed until after the upgrade of the Intertie system.

SDG&E, #3-196, p. 2; NCPA, #3-190, p. 4; TANC, Tr. 440.

BC Hydro saw itself as worse off in the December draft of the policy than under previous drafts of the policy and objected to U.S. extraregional utilities having the potential for access prior to Canadian utilities. BCH, Tr. 449. It also requested clarification of the conditions under which BCHydro could receive access for Assured Delivery. BCH, #3-186, p. 1.

BPA anticipates that if the Free Trade Agreement is passed the distinction between U.S. extraregional utilities and Canadian utilities will evaporate. BPA, Tr. 94.

C. *Analysis and Decision*

If Canadian utilities are willing to provide the same items of value BPA was requiring U.S. extraregional utilities to provide prior to receiving Assured Delivery, BPA sees no reason for denying Canadian utilities access for firm transactions until after the Intertie is upgraded to 7900 MW. This provision has been deleted from the LTIAP.

No extraregional utilities, including Canadian utilities, have an allocation for firm surplus under Exhibit B. Any access they receive would be outside the 800 MW reserved in Exhibit B and would be conditioned on providing something of benefit to BPA and meeting the mitigation provisions in section 4(d). In addition, all proposals would be subject to review by BPA and the public, plus an environmental review.

Section 3. Mitigating Adverse Revenue Impacts

ISSUE NO. 1: Should the LTIAP include mitigation provisions to offset adverse revenue effects of Assured Delivery service?

REFERENCE: 1987 draft policy § 4(c)(2), 4(d)(4)
Final LTIAP § 4(b)(2), 4(d)

A. *BPA Proposal*

The 1986 draft LTIAP proposed to make 420 MW of Assured Delivery capacity available to Northwest utilities with firm surpluses. This capacity was to be made available without regard to any adverse impact on BPA's ability to sell firm power or nonfirm energy to the same Southwest utilities. The 1987 draft proposed to make more capacity available for a greater variety of firm transactions. However, we did so in a manner that would reduce adverse revenue impacts on BPA.

"Mitigation" refers to conditions imposed on a utility in return for an Assured Delivery contract. Intertie Capacity not available to BPA because of Assured Delivery contracts can reduce BPA's revenues and thus inhibit our ability to make Treasury payments. During the operating year BPA often has power available to load the Intertie fully. Assured Delivery granted under these circumstances would reduce our revenues. We are not willing to jeopardize our fiscal responsibilities to the Treasury.

B. *Summary of Comments*

Benton PUD asked BPA to adopt measures that maintain rate stability to our total requirements customers. "If BPA does decide to allow other utilities to use the Intertie, it should only be done at no net loss of revenue

to BPA." Benton PUD, #3-197, p. 1. This sentiment was echoed in the comments of WPAG:

> Generating utilities find themselves in the awkward position of arguing that they wish to make export transactions which will bring substantial economic benefits to the region, but that these transactions cannot bear even a modest charge to offset BPA's foregone revenues. . . . It appears that the generating utilities are attempting to shift as many transaction costs as possible to BPA and its other customers, in order to increase the benefits of export transactions to their ratepayers. WPAG, #3-210, p. 3.

Canby made similar comments. Canby, #3-162, p. 4.

EWEB comments, "BPA has a responsibility to its Priority Firm purchasers to minimize revenue losses as a result of the development of a revised LTIAP. . . . Mitigation provisions must be sufficient to hold BPA and its customers harmless." EWEB, #3-200, p. 2.

NGPU comments, "[W]e do understand . . . the primary focus of the interests of other parties is to shift revenues from BPA to their own utilities. Our group consists of twenty of BPA's full requirements utilities and it is our view that all of your full requirements customers would wholeheartedly oppose such a shift of revenues for the purpose of achieving regional and interregional harmony." NGPU, #3-100, p. 1. ORECA agrees and comments, "the cooperatives are mindful that the rates [BPA] charges to the cooperative consumer are largely based on BPA's revenues. This last rate case showed that when BPA's revenues dip, rate increases are imposed. That . . . is not in any utility's best interest." ORECA, #3-102, p. 1.

The DSIs express concerns similar to the public utilities and comment, "The operational constraints BPA proposed initially would not fully mitigate BPA's revenue loss." DSI, #3-214, p. 2.

The DSI comments also provided an encapsulated version of BPA and PNUCC studies supporting their position: "BPA has estimated its losses for granting 800 MW of Assured Delivery at $15 million to $26 million annually or $19 to $33 per kW. With its limited operational mitigation, BPA estimates its loss would be $13 million to $21 million annually or $16 to $26 per kW. PNUCC has estimated the cost to BPA of making 695 MW available for seasonal exchanges would be as high as $25 million annually or $36 per kW." DSI, #3-214, p. 2. On the other hand, SCL considers that the results from these studies show the revenue impacts on BPA to be negligible and opposes the mitigation proposal in the policy. SCL, #3-136, pp. 1-2.

SMUD comments that while BPA's goal in the proposed LTIAP is protection of revenues, the amount of revenue BPA is attempting to recover is not enough to ensure rate stability. SMUD, #3-183, p. 3.

The CPUC asserts that if BPA is unable to collect enough revenues from California to repay the United States Treasury, BPA should collect those revenues by adjusting its rates to its customers in the Northwest. CPUC, #3-199, p. 3.

C. *Analysis and Decision*

Mitigation presents a typical allocation question: how much benefit should be conferred on each contender and at what cost to others? From the standpoint of BPA's total requirements customers, mitigation embodies the hold-harmless concept they want incorporated into the

LTIAP. The DSIs, for example, argue that mitigation is legally required to offset up to $21 million in annual losses they would attribute to 800 MW of Assured Delivery capacity. DSI, #3-82; p. 5. The DSIs' legal argument springs from the statutory requirement that BPA maintain the "lowest possible rates to consumers consistent with sound business principles." 16 U.S.C. 838g, 825s.

Nothing grates on the total requirements customers more than the CPUC's argument against mitigation that "BPA need merely adjust the rates charged its customers in the Pacific Northwest." CPUC, #3-199, p. 3. Of course, the CPUC is always as extreme in its advocacy as the most strident total requirements customer.[27] However, two basic propositions make it clear that, within this band of rhetoric, there is room for compromise.

First, mitigation is not intended to extract a profit or penalty from Assured Delivery transactions. *Compare* SCE, #3-187, p. 12. The concept of mitigation is quite different from the transmission pricing concept recently established in the Western Systems Power Pool, *Pacific Gas & Electric Co.,* FERC Docket No. ER-87-97-001 PG&E ¶ 61,242 (1987), where profits through value-based

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[27]CPUC criticizes BPA for failure to hold an "evidentiary hearing." CPUC, #3-199, p. 4. For one thing, this ignores BPA staff's submission to intense questioning during five days of transcribed public proceedings and an additional four days of informal discussion with California utilities and regulators. For another, it seems forgetful of the CPUC President's insistence that any public proceeding — much less an evidentiary one — "discourage the candor necessary" to develop a policy acceptable to CPUC. CPUC, #3-78, p. 1. CPUC has demanded that the LTIAP be developed in private meetings, apart from any process open to the public. Finally, we observe that the LTIAP is not a rate subject to hearing requirements. *Bonneville Power Admin.*, 33 FERC ¶ 61,235 (1985); *California Energy Commission v. BPA*, 831 F.2d 1467 (9th Cir. 1987).

pricing are an incentive for utilities to provide more wheeling service. We simply do not want Assured Delivery to worsen BPA's financial situation and the outlook for rate stability.

In this sense, we agree with the DSIs that mitigation is a "sound business principle" within the meaning of BPA's organic statutes. In the absence of mitigation provisions, we could not offer 800 MW of Assured Delivery. Revenue losses would force us to scale that number back. MC-88, attachment 1; PNUCC Study, Tr. 865-870. Indeed, the 420 MW number contained in the 1986 draft LTIAP might be excessive even without mitigation provisions, given concerns about the revenue implications of Assured Delivery service reflected in the 1987 draft. Commenters who find any form of mitigation unacceptable should bear this in mind.

Questions about Intertie usage always seem to involve debate about the original purpose of the Intertie. *E.g.*, PSP&L, Tr. 479. However, the issues at hand cannot be resolved through a regression analysis of what might have been if ownership had been different, or if utilities had first concentrated on firm power transactions instead of spot-market sales. It is clear that BPA's authority to protect its revenues has been established and reaffirmed by the Ninth Circuit Court. In the final LTIAP, we have attempted to balance on a prospective basis the competing demands of generating utilities and total requirements customers and the Treasury. Mitigation is an essential part of that balance.

Second, we have been told repeatedly that interregional firm power sales and exchanges hold the promise of material benefits for the transacting utilities. NRDC, #3-132, p. 4; PG&E, Tr. 110, 427; PSP&L, Tr. 481; WUTC, #3-179, p. 1; WWP, #3-122, p. 2. However, these

benefits should not come at the expense of rate increases for BPA's customers. Mitigation does nothing more than share a modest portion of the benefits made possible by Assured Delivery capacity. Generating utilities have not explained how mitigation would frustrate any beneficial transaction between the Northwest and California.

Therefore, the LTIAP includes mitigation provisions. Issues concerning particular mitigation elements will be resolved on subsequent pages of this decision. We continue to emphasize a willingness to consider departures from the generic form of mitigation, on a case-by-case basis, to accommodate unusual transactions.

ISSUE NO. 2: What specific mitigation provisions should be included in the LTIAP?

REFERENCE: 1987 draft policy § 4(d)(4)
Final LTIAP § 4(d)

A. *BPA Proposals*

It would be a false precision to claim that we could develop mitigation measures that offset dollar-for-dollar the losses projected in any 20-year study. Tr. 8. Assumptions about annual rainfall, gas prices, aluminum prices, and load growth make this exercise judgmental. *Id.* With this limitation in mind, we proposed the following provisions in the 1987 draft policy.

The first mitigation measure was to require that during any hour in which prescheduled energy sales are made under Condition 1 Formula Allocation procedures, a utility must deduct its Assured Delivery amount from its Formula Allocation. If a utility's Assured Delivery amount was greater than its Formula Allocation, then that utility must purchase enough energy from BPA to make up the difference. This mitigation measure was

intended to offset most of the spot market revenues lost by granting Assured Delivery. This proposal was based on comments received on the 1986 draft LTIAP.

Other mitigation was included for Seasonal Exchanges. The 1987 draft policy contained two provisions, in addition to the above mitigation, that would apply to seasonal exchanges. One was a requirement for return of all seasonal exchanges at COB or NOB. The other mitigation measure specific to seasonal exchanges was the limitation on cash-out provisions[28] of an exchange contract. If BPA invoked Condition 1 or Condition 2 allocation procedures, cash-out provisions of seasonal exchange contracts would become inoperative. This mitigation measure was proposed to increase the north-to-south capability of the Intertie during Conditions 1 and 2 when energy is returned and to increase the size of the market for spot-market sales.

B. *Summary of Comments*

BPA received a large number of comments suggesting other means of mitigation or a mix that provides a menu of options. The following is representative of these suggestions.

Southbound Deliveries (the first measure). BPA's primary concern is the loss of spot market transactions resulting from Assured Delivery transactions. During Condition 1, utilities would utilize their Formula Allocation for their Assured Delivery transactions and, if their Formula Allocation was insufficient to cover those transactions, they would purchase the difference from BPA.

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[28]Cash out provisions of Seasonal Exchange contracts allow a Northwest utility to accept dollar payments from a Southwest utility in lieu of actual energy returns.

This measure is one way to hold us harmless from an intrusion on our share of the spot market. BPA, Tr. 10.

The DSIs are concerned that this would not be sufficient to hold BPA harmless and suggest that Condition 1 mitigation be extended to Condition 2. DSI, Tr. 37.

Instead of guaranteeing BPA the revenue from these purchases, WAPA thinks BPA should open this opportunity to all Northwest utilities with a Formula Allocation and suggests that BPA should allow the ability to "buy from any utility, including BPA, that has a surplus." WAPA, #3-189, p. 2.

PG&E essentially agrees with WAPA in regard to the ability to buy from other Northwest utilities to cover a deficiency. However, PG&E would put BPA last in the queue of sellers. PG&E, #3-188, p. 30.

PSP&L comments in regard to the amount of energy BPA may sell as a result of Condition 1 mitigation, "the amount of energy subject to mitigation could be increased significantly, and may even exceed the amount which Bonneville could otherwise have sold." PSP&L, #3-117, p. 8.

SDG&E does not object to a requirement to purchase the difference between the allocation and the Assured Delivery amount but is concerned with the uncertainty of the price. SDG&E, #3-196, p. 2.

SCE thinks that Assured Delivery should be in addition to a utility's Formula Allocation. SCE prefers "no penalty, mitigation or infringement" on any Assured Delivery contract and does not like the uncertainty of what the additional costs might be or when they might be imposed. SCE, #3-187, pp. 12-13.

Cash-out Limitations. The purpose of cash-out limitations in the 1987 draft policy was to allow BPA and other utilities to participate in the market created by the returns in Condition 1 and 2. BPA, Tr. 52. Otherwise, exchanging utilities could seize much of the spot market through exchanges, even though their Formula Allocations might be small. Analysis shows that with mitigation BPA is still negatively impacted, even on the spot market, from the seasonal exchanges. BPA, Tr. 58.

EWEB agrees and points out that this provision not only protects BPA but also protects the ability of non-exchanging nonfederal utilities from a loss of potential nonfirm markets. EWEB is concerned that replacing this mitigation provision with a surcharge would eliminate the benefit to nonfederal utilities. EWEB, #3-137, p. 2.

PG&E is concerned that nonfederal utilities such as EWEB would share in the benefits while not participating in the exchanges. PG&E views the cash-out provisions as only revenue devices, "with no link to alleged adverse effects of Assured Delivery." PG&E, #3-188, p. 30.

WPAG itemized the benefits BPA might realize from a nonfederal seasonal exchange that would be reduced by cash-out provisions, including "wheeling revenues, winter return energy sales revenues, counter-scheduling and [construction] deferral of regional resources." WPAG, #3-123, p. 11.

WAPA comments that cash out limitations could cause "the exchanger to generate and return energy during a time when the Northwest does not need the energy, in effect, exacerbating spill conditions." WAPA, #3-189, p. 2.

PSP&L comments that the cash-out restriction would benefit BPA by increasing wheeling revenues but would

not pass those credits on to the exchangers. PSP&L, #3-117, p. 7-8.

ICP views mitigation of the southbound deliveries plus a mitigation of the return of that delivery as a double benefit to BPA, which "removes a potential, major benefit of exchanges and attempts to create a market for Bonneville by force." ICP, #3-119, p. 9.

Other Mitigation Suggestions. PGP comments, "The PGP supports mitigation for real costs (and real benefits) incurred as a result of Assured Delivery transactions . . . and encourage the development of a menu of options (contractual, operational, financial, etc.) which may be used, on case-by-case basis, to ensure compensation for either BPA or nonfederal utilities incurring costs as a result of the transaction." PGP, #3-194, p. 9.

NGPU includes in its comments another alternative:

> The two mitigation measures proposed in the LTIAP are complex and even then only return on the order of 20-25 percent of BPA's losses. However, it is our view that although it may be difficult to negotiate a simple cash reimbursement to BPA based on each transaction, that concept needs to be seriously investigated. Another alternative is a system access fee "to recoup projected losses from those parties that are profiting by accessing the Intertie. [NGPU, #3-100, p. 3.]

PNGC comments, "[T]he LTIAP should permit utilities to negotiate mitigation with BPA on a case-by-case basis. Moreover, mitigation should not be required if providing Assured Delivery will have a neutral or positive effect on BPA's revenues." PNGC, #3-141, p. 3.

The following entities are in favor of case-by-case mitigation: NGPU (Tr. 494); PNGC (#3-141, p. 3); SCL

(Tr. 501); TANC (#3-182, p. 2); WPAG (Tr. 515); WWP (#3-122, p. 19); and PPC (#3-125, p. 3).

C. *Analysis and Decision*

This issue points out to BPA the individual nature of each utility and the need for flexibility in the LTIAP, particularly in the LTIAP provisions for mitigation. We include in the LTIAP an opportunity for utilities to pick the best form of mitigation for their needs. Operational mitigation is still in the policy as an option (section 4(d)). However, the requirement for delivery of returns of energy at COB/NOB has been moved as a condition for access to section 4(a) and is not viewed as mitigation. This is discussed in more detail in the Conditions for Assured Delivery Access section, Issue 4.

We have decided to include an opportunity for utilities to negotiate individual packages of mitigation, in addition to the mitigation provisions in the LTIAP in section 4(d). Such case-by-case mitigation packages could be a combination of the above mitigation provisions or could include beneficial arrangements for BPA that have not been addressed in this policy. Our main concern in any mitigation package is recovery of short-term revenue impacts, but we will also be looking at the operational impacts of any proposal.

We have also changed the requirements for purchasing from BPA any difference between a utility's Formula Allocation and its Assured Delivery requirement. During Condition 1 a utility may purchase from any utility with an allocation, not just BPA. During Condition 2, the utility must first purchase from BPA, and if BPA is not in the market then may purchase an allocation from other utilities with an allocation. This change gives utilities more flexibility and should not harm us with the current

true up arrangements provided under Condition 1 allocation procedures.

ISSUE NO. 3: Should BPA provide scheduling utilities with a mitigation charge alternative?

REFERENCE: 1987 draft policy — no reference
Final LTIAP § 4(d)(2)

A. *BPA Proposal*

We did not propose a mitigation charge in any draft of the LTIAP.

B. *Summary of Comments*

The concept of a surcharge was introduced during the public process. WAPA favors the idea of a surcharge and suggests it be developed through the ratemaking process. It suggests that the surcharge be based on a determination of BPA's lost revenue and be included as an option to operational mitigation. WAPA, #3-189, p. 2. MPC comments, "If BPA insists on mitigation, it should do so by simply charging a reasonable fixed surcharge in addition to the cost of the facilities." MPC, #3-111, p. 3.

IPC supports a surcharge approach, claiming that it is an antidote to the uncertainty facing some utilities that wish to negotiate Assured Delivery contracts without the ability "to fairly determine financial liability and exposure to mitigation costs up front. . . ." IPC, #3-131, p. 2. In a similar vein, PPC supports a surcharge because of its simplicity. PPC, #3-125, p. 1.

The DSIs see the surcharge as an opportunity for BPA to recover the total loss of revenue associated with nonfederal usage of the Intertie. The DSIs recommend a surcharge in addition to operational mitigation. DSI, #3-82, p. 2.

WPAG comments that if BPA provides access it must receive mitigation that fully compensates it for any revenue losses. WPAG recommends a charge based on current and future losses. WPAG suggests the charges could be different for firm power sales and seasonal exchanges. WPAG, #3-123, p. 7.

SCL does not agree with the DSIs and WPAG that a surcharge be added to the existing mitigation measures. SCL comments, "Again, there is skepticism as to the real costs and benefits that BPA and its customers may incur as a result of allowing nonfederal utilities access." SCL, #3-210, p. 3.

SDG&E comments, "The Policy contains numerous operational mitigation measures which we believe unduly complicate system operations. . . . SDG&E suggests that the policy contain an option of a surcharge in lieu of operational mitigation." SDG&E, #3-196, p. 2. LADWP agrees with SDG&E. LADWP is concerned with the uncertainty of proposed mitigation in the draft policy but "still believes that imposition of any fees in excess of cost based transmission service rates violates BPA's obligation to provide Intertie access to nonfederal utilities." LADWP, #3-192, p. 2.

WWP opposed the surcharge. WWP, #3-122, p. 19. EWEB comments that it would not favor a surcharge if it would take the place of the cash-out provision because the cash-out provision protects EWEB's ability to make nonfirm sales. EWEB, Tr. 930.

C. *Decision*

The concept of a surcharge was attractive to BPA and several utilities. However, the procedural requirements of Northwest Power Act section 7(i) would require considerable time unless all interested parties agreed not to

intervene in the process. BPA advanced the proposal in a prehearing and received considerable negative response. Therefore BPA has decided to drop the proposal at this time. This does not prevent BPA from developing charges on a case-by-case basis.

Section 4. Canadian Treaty Power

ISSUE: Should the LTIAP make express provision for Canadian Treaty power?

REFERENCE: This issue is not addressed in the policy.

A. *Proposal*

PG&E requests that the policy expressly provide transmission service for transactions by which British Columbia might dispose of downstream power benefits to which the province is entitled under the treaty between Canada and the United States relating to development of Columbia River hydro resources. Such transactions are referenced in section 6 of the Northwest Preference Act.

B. *Response*

Several reasons cause us to defer this question until it becomes less speculative.

First, the province would not be in a position to sell its downstream power benefits to California until 1998, at the earliest. The benefits were previously sold to U.S. utilities under 30-year contracts that do not begin to expire until 1998. Thereafter, these benefits revert to British Columbia over a 6-year period.

Second, at this time, it is impossible to quantify the benefits that will revert to the province. We simply do not

know the magnitude of Intertie transmission service we might be called on to deliver.

Third, it is not clear whether the province will decide to sell the downstream benefits in new contracts after 1998. It might decide, instead, to use the benefits to satisfy native load growth within the province.

Fourth, until negotiations between the province and potential U.S. buyers are concluded, we have no idea what form possible transactions might take. Downstream benefits might be shaped into firm power sales or exchanges, or even nonfirm transactions, each with a distinct impact on Federal usage of the Intertie.

All these reasons cause us to distinguish the PG&E transmission request from the relatively certain requests for Assured Delivery capacity made by utilities in the Northwest and California. Moreover, additional research, is required on the status of any Canadian entitlement priority after existing entitlement sales terminate. Each Assured Delivery request is supported either by an executed contract or by a proposed transaction for which a contract is now being negotiated. We will leave the question about Intertie access for British Columbia's downstream power benefits for a later version of the LTIAP.

PART FOUR
FISH AND WILDLIFE PROVISIONS
"PROTECTED AREAS"

ISSUE NO. 1: Should we adopt the "protected area" concept as a means of satisfying our fish and wildlife responsibilities?

REFERENCE: 1987 draft policy § 7(c)
Final LTIAP § 7(c)

A. *BPA Proposal*

We included fish and wildlife provisions in the near-term and proposed long-term policies to protect the investments we have made and will continue to make to protect, mitigate, and enhance fish and wildlife in the Columbia River Basin. Since passage of the Northwest Power Act, our ratepayers have invested nearly $120 million in habitat, passage, hatchery, and projects to meet the Council's interim goal of doubling anadromous fish runs in the Columbia River Basin. In addition to these expenditures, BPA annually forgoes $30 to $60 million in revenues due to the implementation of the Water Budget and spill programs. These programs improve flow and passage conditions for migrating juvenile salmon and steelhead; they also reduce electric generation on the Federal hydro system.

We do not want the LTIAP to encourage hydro operations or developments that compromise our investments in the Columbia Basin. We also hope to discourage hydro developments that, by creating passage or habitat problems, increase the cost of our future investments.

To achieve these objectives, the 1986 draft policy established procedures by which complainants could notify us if a particular resource was harming fish or wildlife. However, utilities, fish and wildlife agencies, and tribes generally argued that the 1986 draft procedures were ineffective. Their concerns centered on two problems.

First, the procedures allowed challenges to hydro projects well after the licensing process was completed. Consequently, a developer could undergo the expense of the FERC licensing process, meet FERC's fish and wildlife requirements, and still be denied Intertie access after BPA's subsequent procedure. Developers disliked the uncertainty and fish and wildlife interests disliked the lengthy procedures.

Second, the 1986 draft proposed enforcement mechanisms seemed ineffective. Fish and wildlife interests believed the LTIAP would allow projects to support sales over the Intertie even though they were harmful to fish or wildlife.

The 1987 draft policy sought to accomplish our objectives with a much simpler mechanism, the "protected area" concept. As presently proposed by the Northwest Power Planning Council, protected areas are specific stream reaches withdrawn from hydro development due to the presence of high-value wildlife and anadromous and high-value resident fish. Stream reaches may also be protected where future investments in habitat, hatchery, passage, or other projects may result in the presence of anadromous fish. The LTIAP's proposal differed from the Council's proposal in that protected areas would be restricted to stream reaches within the Columbia River Basin — the proposed Council designations cover the entire Pacific Northwest.

The 1987 draft policy automatically reduced a utility's access to the Intertie if it built or acquired a project located in a protected area. Our choice of the protected area concept sought to address utilities' concerns about the uncertainty of BPA actions, eliminate lengthy procedures that could increase development costs, and establish an effective enforcement mechanism.

B. *Summary of Comments*

We received more comments concerning the use and scope of protected areas than any other provision in the policy. A vast majority of commenters — many of them private citizens — support BPA's adoption of the protected area concept. NMFS, which had previously criticized our implementation of fish and wildlife provisions in the NTIAP, states: "Unlike previous draft and interim policies, the new policy provisions concerning fish and wildlife are clear, unambiguous, easy to administer, and enforceable." NMFS, #3-120, p. 1. Similar comments are made by NRDC [#3-132], which had previously criticized the near-term policy.

Commenters generally agree that the IAP can influence the operation and development of hydroelectric resources in the Northwest, "Clearly, the intertie has, and likely will continue to, serve as an incentive to new hydro development in the Northwest. It is thus quite appropriate that BPA should include provisions in the LTIAP that prevent the intertie from being an incentive for inappropriate resource development. . . . " Friends of the Earth, #3-202, p. 2. NRDC states, " . . . no one can dispute that the export markets associated with Intertie access exert potent influence over decisions about developing and operating resources." NRDC, #3-132, p. 1. This view is shared by the Idaho Attorney General. IAG, #3-126.

ICP does not specifically dispute the connection between the IAP and hydro development, but states: "We have yet to hear of a single case in which a nonfederal development has impacted BPA costs." ICP, #3-119, p. 9.

PNUCC does not dispute the connection between the IAP and hydro development. It states that it "is willing to talk about some method in which BPA can ensure that its Intertie is not inappropriately used as a justification to construct new resources that we wouldn't allow be constructed in the region without the Intertie." PNUCC, Tr. 735.

PNUCC proposes alternative fish and wildlife provisions which are endorsed by several commenters. The PNUCC proposal provides for BPA to conduct a project-by-project determination and deny access if BPA determines that a proposed project adversely impacts BPA fish and wildlife investments, adversely impacts other BPA fish and wildlife responsibilities, or impairs BPA's ability to comply with provisions in the Council's Fish and Wildlife Program. PNUCC, #3-135, Attachment 1.

Although utilities recognize that the IAP could affect hydro development and operations, they state that FERC license requirements and procedures are sufficient to prevent hydro operations and developments harmful to fish and wildlife:

> While we applaud BPA's apparent goal of protecting fish and wildlife as well as the Administrator's actions or expenditures related to these resources, there is no need for BPA to take actions which are in addition to hydroelectric project licensing and license review procedures established by the Federal Energy Regulatory Commission (FERC). PP&L, #3-138, p. 3.

IPUC suggests that "[i]f BPA determines there will be negative impacts on its fish and wildlife investments from hydro projects it should oppose construction based on its own analysis or submit a mitigation proposal during the existing FERC licensing." IPUC, #3-116, p. 2. Similar comments are made by WWP. WWP, #3-122, pp. 14-16.

In addressing BPA's legal authority to include fish and wildlife provisions, NRDC concludes, "FERC regulation is no substitute for the unique BPA/Council commitment to double the Columbia Basin's devastated fish runs, in response to the mandate of the Pacific Northwest Electric Power Planning and Conservation Act." NRDC, #3-132, p. 3.

Similar comments are made by WPAG, which states: "BPA has an independent responsibility to determine where it has made fish and wildlife investments, and whether proposed resource development located in the Columbia Basin will adversely impact these investments." WPAG, #3-123, p. 20. And SCL, with generating capabilities of its own, states: " . . . we understand and support the potential for reducing access to the Intertie if new hydroelectric resources are developed in environmentally sensitive (Protected Areas) locations." SCL, #3-136, p. 3.

However, LADWP questions why fish and wildlife provisions were included in the IAP at all. It suggests that we adopt a fish and wildlife policy that would deny access to any BPA transmission facility. "If power from a resource cannot be delivered within the Northwest, or to the Intertie, it's not necessary to address the problem in the IAP." LADWP, Tr. 639. Similar comments are made by CEC. CEC, #3-218.

Several other utilities question the relevance of fish and wildlife measures to the LTIAP. "Edison believes that BPA should not use the LTIAP to be the mechanism for implementing its fish and wildlife objectives." SCE, #3-187, p. 28. Similarly, PSP&L argues:

> Access to Intertie capacity cannot and should not be restricted by perceived fish and wildlife impacts of generating resources or based on compliance with licenses, permits, or laws in connection with the development or operation of generation resources. Bonneville has no authority to impose such restrictions on Intertie access. PSP&L, #3-117, p. 9.

Several commenters suggest that BPA eliminate specific reference to protected areas and merely ensure that the policy be consistent with the Council's Fish and Wildlife Program. CRITFC states, "We believe that the LTIAP should recognize and rely upon the Council's Program and Plan for the protection of fish and wildlife with respect to access to the BPA controlled portions of the Intertie." CRITFC, #3-204, p. 1. Similar views are expressed by the Idaho Attorney General [#3-126].

But PGP disagrees. "We do not believe that consistency with the plan or program is necessarily the appropriate question, that instead, BPA should evaluate whether or not a project will adversely affect or reduce the effectiveness of the Administrator's investment in fish and wildlife." PGP, #3-194, p. 12.

NRDC addresses the issue of whether BPA should act on the protected area concept before the Regional Council decides whether to adopt a protected area program:

> The database used to designate "Protected Areas" is hardly the exclusive province of the Council; indeed, BPA itself funded and helped staff the effort. It is

> hardly unreasonable for BPA initially to frame its Policy by reference to environmental information that BPA collaborated in assembling. Once the Council has acted, BPA pledges to issue conforming Policy amendments, 'subject to BPA review of Council changes.' This seems a reasonable exercise in cooperative federalism. NRDC, #3-132, p. 6.

Many other commenters support the inclusion of fish and wildlife provisions, including Northwest Members of Congress [#3-142]; the Idaho Attorney General [#3-126]; the Governor of Montana [#3-127]; the Governor of Oregon [#3-134]; the State of Washington Utilities and Transportation Commission [#3-92]; and the Washington Departments of Fisheries [#3-113] and Game [#3-152].

C. *Analysis and Decision*

We know of no alternative to the protected area concept that satisfies our administrative objectives of practicality and clarity. No such alternative has been suggested by commenters. The choice is between the protected area concept and removal of fish and wildlife protective measures from the LTIAP.

We believe the protected area approach provides the best assurance for fish and wildlife protection with the least amount of procedural duplication and uncertainty. Protected area designations would send an unambiguous, self-enforcing message to FERC, other regulators, and hydro developers that no Intertie access will be provided for projects constructed in areas of greatest concern to BPA and the Council. Southwest market access could not be reflected in any accurate assessment of need for a project.

Our protected area designations are made with sufficient analysis by BPA, the Council, and others. The data include:

- Anadromous fish data collected by state and Federal fish and wildlife agencies and tribes under Council direction.
- Resident fish and wildlife data collected by state and Federal fish and wildlife agencies and tribes and interested parties such as hydro developers as part of the BPA-funded Pacific Northwest Rivers Study.
- The Pacific Northwest Hydropower Data Base and Analysis System, which includes detailed information about 4,000 potential and existing hydro projects. This information was obtained using FERC data through a joint effort by BPA, the Council, and the Corps.

We made available to the public a complete listing of the proposed protected areas in the 1987 draft. During the comment period we received no objections to any specific river or stream reach designated as a protected area.

The PNUCC proposal would involve a process similar to the one BPA proposed in earlier IAP drafts and which many previous commenters, including utilities, found objectionable. However, the final IAP has been revised to address several concerns raised by PNUCC and others. These revisions are discussed below as specific issues raised by the implementation of the protected areas concept.

BPA has never disputed FERC's regulatory role in addressing fish and wildlife concerns. The Electric Consumers Protection Act (ECPA), 16 U.S.C. § 797(e), may

have provided FERC with increased fish and wildlife responsibilities. However, ECPA does not require FERC to protect BPA investments in fishery enhancement. From time to time as FERC considers specific hydro projects. BPA has participated, and will continue to participate, in those proceedings based on fish and wildlife concerns. But BPA has its own specific statutory responsibilities that focus on its own fish and wildlife investments.

We have distinct statutory responsibility to protect, mitigate, and enhance fish and wildlife. The authority to include fish and wildlife provisions in the LTIAP was recently supported by the Ninth Circuit Court, *California Energy Commission v. BPA,* 831 F.2d 1467, 1477-78 (9th Cir. 1987). We believe that exclusive reliance on FERC intervention may not provide sufficient protections for BPA's fish and wildlife investments. FERC has no explicit statutory mandate to protect those investments and may ultimately license projects that could negatively affect those investments.

Standards contained in the Northwest Power Act are more definitive than FERC's mandate under ECPA. Despite the different statutory mandates, the LTIAP does not preempt the FERC role. It is intended to ensure that we are able to meet our fish and wildlife goals and ensure the productivity of our fish and wildlife investments. Furthermore, as a Federal agency we are required to consider how we may, in the course of taking major actions, promote, preserve, or enhance the quality of the human environment. *Id.*

By designating specific stream reaches where habitat supports high-value wildlife and anadromous and high-value resident fish, BPA seeks to assist FERC and hydro developers as they evaluate sites *before* they devote any

resources to the development of a project. The LTIAP recognizes that FERC may override these concerns. Although FERC is directed to consider state and regional fishery management plans such as the Council's Fish and Wildlife Program and to provide equitable treatment to fish and wildlife under 4(h)(11)(A) of the Northwest Power Act, and to provide "equal consideration to fish and wildlife under ECPA, FERC must also consider other factors in making its determinations.

LADWP is correct that BPA could fashion alternatives, such as a main transmission grid policy, to address its fish and wildlife concerns. However, even if we chose to adopt such an alternative, the basic issues raised by implementation of such a policy would remain. Extraregional sales would be affected and differences in opinions concerning FERC's role would persist.

ISSUE NO. 2: Should protected area designations be restricted to the Columbia River Basin?

REFERENCE: 1987 draft policy § 1(13)
Final LTIAP § 1(14)

A. *BPA proposal*

Previous versions of the IAP restricted the fish and wildlife provisions to new and existing hydro projects in the Columbia Basin. We continued this focus in the 1987 draft, which proposed to designate protected areas only within the Columbia River Basin. The 1987 draft differed from the Council's proposal which would designate protected areas throughout the Northwest.

B. *Summary of Comments*

Nearly all of the comments BPA received supporting the use of protected areas also suggest that we extend the

IAP protected area designations to the entire Northwest. Support for regional protected areas is based on the concern that if restrictions are applied only within the Basin, BPA would encourage development outside the Basin. "We fear that if you do not apply your policy to all of the Protected Areas in the State of Washington, hydro developers will put enormous pressure on the river resources outside the basin," Sierra Club, #3-155, p. 2.

Many commenters suggest that increased development outside the basin would threaten BPA's interests inside the basin: "From the perspective of damage to the Northwest's anadromous fishery, hydropower development *outside* the Columbia River Basin is potentially a larger problem than in-Basin construction.... Hydropower-related reductions in out-of-Basin runs translate inexorably into increased fishing losses for in-Basin runs." NRDC, #3-132, p. 5.

The Northwest Power Planning Council states:

> The Council believes that the reasons for giving consideration to fish and wildlife within the basin apply equally to the region outside the basin. While questions can be and are raised with respect to the Council's authority to deal with fish and wildlife outside the basin, no such restriction impinges on BPA action and we believe some further attention to Intertie access conditions outside the basin is in order. NWPPC, #3-139, p. 1.

Similar comments are made by NMFS [#3-120], Friends of the Earth [#3-203], NCAC [#3-216], the Governor of Oregon [#3-134], several Northwest Congressional representatives [#3-142], and members of the general public.

A significant number of commenters, including the Council, suggest that we simply commit to mirroring the Council's designations: "... if Bonneville intends to rely on Council protected areas, we believe that Bonneville should not rely on some parts and exclude others." NWPPC, #3-139, p. 1.

Commenters who oppose the protected area concept also oppose designating areas outside the Basin. "The presumption that out-of-Basin development of hydroelectric resources will have 'potentially devastating fishery consequences' is extremely dramatic and misleading." PNUCC, #3-202, p. 4.

Some utilities comment that BPA's role inside the basin differs from outside the basin. The Canby Utility Board comments:

> We do believe Protected Areas in the IAP should be limited to the Columbia Basin (BPA does not have responsibilities or investments in fish outside the Basin), to salmon and steelhead (resident fish and wildlife are being restored on an ad hoc basis which is incompatible with a comprehensive approach such as Protected Areas) and to new projects (mitigation for existing projects are [sic] established by license conditions and the Fish and Wildlife Program). Canby, #3-162, p. 3.

Similar comments are made by SCL [#3-136].

C. *Analysis and Decision*

The effect on anadromous fish returns in the Columbia Basin from hydro development outside the Basin is indirect. In addition, we see no evidence that significant increases in fishery damage will occur outside the Basin if BPA does not impose restrictions on Intertie access for

projects located in the Council's protected areas outside the Basin. Those projects would still be addressed by BPA, Council, and agency comments during the FERC licensing process. As provided by ECPA, FERC must provide equal consideration to fish and wildlife and must provide substantial deference to state agency recommendations.

BPA's mandate is to protect, mitigate, and enhance fish and wildlife in the Columbia Basin. It is our conclusion that the risk of significant harm occurring to BPA's fish and wildlife investments in the Basin from hydro development outside the Basin is unproven on the record. We wish to restrict BPA's regulatory presence to risks which are substantial.

The LTIAP does not reflect a lack of concern about hydro development outside the Basin. If we determine that a project outside the basin poses a threat to existing or planned BPA fish and wildlife investments, we will intervene in the FERC process.

ISSUE NO. 3: Should BPA categorically deny access to all projects located in protected areas?

REFERENCE: 1987 draft policy § 7(a)
Final LTIAP § 7(e)

A. *BPA Proposal*

The 1987 draft policy denied Intertie access categorically for projects located within protected areas. The policy presumed that any development in those areas would harm fish and wildlife and detract from BPA's investments and the Council's goals. The 1987 draft sent a clear signal to developers and avoided a timeconsuming, staff-intensive, and possibly duplicative review of the biological effects attributed to any hydro project.

B. *Summary of Comments*

Many of the comments concerning this issue contend that BPA should provide a means by which project developers can challenge the presumption that particular projects located in protected areas harm fish and wildlife. For example, PNUCC proposes that BPA conduct a project-by-project determination and deny access if BPA determines that a proposed project adversely impacts BPA fish and wildlife investments; adversely impacts other BPA fish and wildlife responsibilities; or impairs BPA's ability to comply with provisions in the Council's Fish and Wildlife Program (including protected areas). PNUCC, #3-135, Attachment 1. PNUCC's proposed alternative fish and wildlife provisions are endorsed by several other commenters. PGP states:

> If BPA's goals are to have the least intrusive role possible while sending utilities the clearest message, couldn't BPA's policy state that BPA will not grant any access to a resource that it finds is a "bad resource?" . . . A "bad resource" is any resource in a protected area in the Columbia Basin for which the utility cannot demonstrate that it will hold BPA harmless for its fish investments and cannot demonstrate that the resource will do no damage to fish runs. PGP, Tr. 766.

Northern Wasco PUD also recommends that sites be considered individually and access granted or denied on the merits of each site. "(T)here are sites that can be developed with no or minimal harm to the fishery. We feel it is unrealistic to preclude development at these sites with a blanket 'protected area' designation." Wasco, #3-085, p. 1.

IPUC comments that we should review individual projects and suggest how impacts we identify might be mitigated. "If BPA determines there will be negative impacts on its fish and wildlife investments from hydro projects it should oppose construction based on its own analysis or submit a mitigation proposal during the existing FERC licensing." IPUC, #3-116, p. 2.

On the other hand, many of those supporting the use of protected areas comment that the concept should bar the construction of hydro projects. For example, "if all the interested parties would work together in support of Protected Areas and the LTIAP, new hydro projects simply would not be built in Protected Areas." Friends of the Earth, #3-203, p. 2. But NRDC states: "It should also be possible to exempt projects from protected areas if they would enhance or at least not harm fish. " NRDC, Tr. 738.

Several commenters continue to suggest that BPA should not concern itself with putting specific provisions in the IAP but merely ensure that access be granted only to projects that are consistent with the Regional Council's program.

C. *Analysis and Decision*

We agree that categorically denying access to hydro projects located in protected areas may discourage projects which might advance the Council's Program or our investments. Consequently, we have revised the policy to provide a limited opportunity to review proposed developments to determine if the prohibition should apply. However, we believe very few of the projects proposed in protected areas will provide increased seasonal flows, improved passage, or other conditions which could pro-

vide benefits to BPA's investments or the Council's Program. This provision is intended only as a safety valve.

The policy would continue our original intent: access to projects located in protected areas will be denied. But if we receive sufficient proof that a project will actually benefit existing or planned BPA fish and wildlife investments or the Council's Program and will have no significant adverse environmental effects, we may reconsider this prohibition.

Our determination would be based on information including: agreements with Federal and state fish and wildlife agencies and tribes; action by the Regional Council; and any technical information which would quantify the benefits attributed to the proposed project. We do not propose to establish explicit standards that define the degree to which a project must contribute to BPA's or the Council's fish and wildlife goals. We recognize that additional information concerning a project's fish and wildlife effects may become available during the FERC licensing process.

In a related issue, the 1987 draft policy did not provide a process to consider if a particular stream reach is improperly designated as a protected area. However, the policy indicates that BPA would reevaluate protected area designations as new information becomes available or as the Council acts. We believe the policy adequately reflects suggestions that we provide an explicit process to address technical issues concerning the designation of protected areas.

ISSUE NO. 4: How should BPA coordinate provisions concerning protected areas with the Northwest Power Planning Council?

REFERENCE: 1987 draft policy § 7(b)
Final LTIAP § 7(c)

A. *BPA Proposal*

As we developed the 1987 draft policy, we considered ways in which we could provide in our decisions for consideration of the Council's Program. The 1987 draft policy noted that implementation of the LTIAP might precede adoption of the Council's protected area program but provided for BPA to reevaluate protected area designations once the Council adopted or modified its proposal.

We have identified two related issues concerning coordination with the Council. First, what provisions, if any, should be included in the IAP given that the Council has not yet, and conceivably may never, designate protected areas? Second, assuming that the Council does adopt a protected area program, what provisions should we include to address changes the Council might adopt over the years as protected areas are implemented?

B. *Summary of Comments*

Several commenters state that BPA should not adopt a protected area program until after the Council acts. "It is premature for BPA to adopt the staff's proposed protected areas criteria when the Council has not even accepted the criteria. . . . It is premature for BPA to act when the Council has not acted." PNUCC, #3-202, p. 3; *see* WPAG, Tr. 396.

Canby Utility Board disagrees:

> BPA can use the existing data bases to designate stream reaches supporting salmon and steelhead as Protected Areas even if the NW Power Planning Council does not. We believe that this would be far preferable to alternatives — such as 'consistency with the NPPC Program' — which are too broad and create too much uncertainty. Canby, #3-162, p. 4.

The Council encourages us to reconsider the policy once it has acted:

> . . . Bonneville would be on sounder footing in relying on a Council proposal as criteria for Intertie access rather than a staff proposal. We appreciate that Bonneville would review its protected areas based on the outcome of the Council's rulemaking process. NWPPC, #3-139, p. 1.

C. *Analysis and Decision*

The LTIAP provides a sufficient indication that BPA will consider the Council's protected area designations when finalized. We will "implement, after review and possible modification, a comprehensive protected area program adopted by the Pacific Northwest Electric Power and Conservation Planning Council." LTIAP Section 7(c). We have clarified this language to indicate our willingness to consider the Council's protected area program once it is adopted and is revised with the implementation of planning efforts in the future. We have also revised the policy to provide for BPA consideration of appropriate state comprehensive water plans affecting hydro development.

We considered but rejected a "sunset clause" which would have terminated the fish and wildlife provisions if the Council chooses not to adopt a protected area concept. We determined that a sunset clause would not contribute to the Council's deliberations and would leave BPA with insufficient protection for our fish and wildlife investments.

ISSUE NO. 5: Should the IAP fish and wildlife provisions apply to existing projects?

REFERENCE: 1987 draft policy § 7(a)
Final LTIAP eliminated

A. *BPA Proposal*

The 1986 draft LTIAP proposed for BPA to determine if the operation of existing hydro projects resulted in a "substantial decrease in the effectiveness of, or a substantial increase in the need for, expenditures or other actions by the Administrator to protect, mitigate, or enhance fish and wildlife. . . ." The 1987 draft policy proposed that if an existing project was located in a protected area, at the time of license expiration, "BPA would assist the licensee in developing any necessary protective conditions so that the project may continue to qualify for Intertie access." Section 7(a).

We included provisions applicable to existing resources because we believed those projects can harm BPA's fish and wildlife investments in the Basin. For example, by altering flow regimes or neglecting fish bypass systems, a hydro project could significantly increase mortality of fish produced by BPA-funded hatchery or habitat projects upstream.

B. *Summary of Comments*

BPA received extensive and diverse comments concerning access to the Intertie for existing hydro projects. While some commenters support provisions applicable to existing projects, not one commenter supports the 1987 draft policy provisions. Several utilities claim FERC is uniquely charged with reviewing the fish and wildlife effects at the time existing projects are relicensed. PNUCC, #3-202, p. 2.

Many commenters, including the Council, state that the proposed protected area program is not intended to apply to existing hydro projects. For example, the Governor of Oregon states:

> The fish provisions should apply to new hydro projects but not to existing dams. For existing dams the proposed penalty is extreme and does not reflect the cost imposed on the fish program. Problems at existing dams should be settled in the FERC arena. Governor of Oregon, #3-134, p. 2.

The Idaho Attorney General [#3-126], NWPPC [#3-139], and others claim that BPA should not rely solely on FERC but that we should not apply our own fish and wildlife standards to existing hydro projects. They suggest that BPA rely on consistency with the Council's Program.

> We recommend that the IAP simply require consistency with the Columbia River Basin Fish and Wildlife Program as a pre-condition to Intertie access. The conditions for existing resources are predictable because they are set forth in the program. Idaho Attorney General, #3-126, p. 2; *see* NWPPC, #3-139, p. 2.

Utilities generally endorse the Council's view that protected areas should not be applied to existing projects:

> The protected areas concept as envisioned by most parties, if not all, has been intended to apply exclusively to presently undeveloped stream reaches and not to modification or relicensing of existing projects .... The present proposal to impose sanctions upon existing, non-Federal projects which happen to fall within a protected area is directly in conflict with the

intended applicability of this concept. WWP, #3-122, p. 15.

Many commenters who oppose the use of protected areas for existing resources also do not believe any provisions should be applied. WWP cited the uncertainty created by potentially denying access to existing resources:

> WWP continues to oppose loss of access for regulatory events which are beyond WWP's control and which occur after firm access has been granted, such as FERC relicensing conditions, or future action by the Northwest Power Council to adopt new protected area designations in originally unprotected stream reaches. WWP, #3-195, p. 3.

NCAC suggests that BPA enforcement should be applied to existing projects only when they fail to meet hydro operations requirements, such as flow regimes, contained in the Council's Program. NCAC, #3-206, p. 3. NCAC's reasoning appears to be that access to the Intertie could likely induce non-compliance with requirements such as maintaining flow levels. NCAC concludes that BPA should allow access if an existing project does not conform to structural requirements, such as the installation of bypass structures.

Some commenters agree that the draft policy would create undesirable uncertainty during the relicensing process, but they suggest that BPA's reliance on the Council's Fish and Wildlife Program would eliminate this uncertainty:

> It's important for the contracting parties to have a clear understanding of what the expectations are on relicensing. There is a way for them to get that, if the relicensing provisions are keyed to the Council's

> F&W program, where you can find out exactly what the obligations are. NRDC, Tr. 701.

Several commenters also suggest that BPA deny access to Federal as well as non-Federal projects that do not conform to the Council's program. NMFS comments: "Federal as well as non-Federal projects should be covered by the IAP in the interest of fish and wildlife protection." NMFS, #3-120, p. 3. NMFS also suggests that BPA should deny access to existing projects that do not "meet full protection/mitigation/compensation requirements." NMFS provides a list of projects it believes create fish and wildlife problems.

> While comments suggest that access be denied to existing projects not in conformance with the Council's Program, those comments do not indicate the procedures BPA should follow to determine if a particular project is not in compliance. NMFS suggests that, "imposition of the fish and wildlife provisions of the IAP should not be delayed until the time of relicensing, which may not occur for decades." NMFS, #3-208, p. 1.

The Council argues that we should not wait for FERC relicensing:

> The Council believes that, because the fish and wildlife program is in place, consistency determinations could be made in the near term. The program's measures are clear, and the Council is committed to monitor and amend the program so that the program's measures and timetables remain appropriate and realistic. The Council would work with Bonneville to develop a process for making consistency determinations. NWPPC, #3-213.

C. *Analysis and Decision*

The Council is clear that the protected area concept is not intended to cover existing hydro resources. We agree. The issue then becomes a question of whether the LTIAP should go beyond protected areas to become a general enforcement mechanism for the Council's Fish and Wildlife Program. Beyond legal concerns, we have basic questions about the practicality of such a role.

The Columbia River Basin Fish and Wildlife Program explicitly relies on FERC for enforcement of program measures calling for operational and structural changes at existing non-Federal hydro projects. Other measures direct project operators to work with fish and wildlife agencies to study fish and wildlife problems and consider possible corrections. We do not propose to assume the role of arbitrator between the Council and these other agencies.

For example, Program measures involving FERC will be addressed in licensing proceedings under the Federal Power Act. FERC will either adopt the measure or reject it. Dissatisfied parties then have judicial recourse before the Court of Appeals. If FERC erred, the court will remand proceedings for further administrative action. There is no role for BPA here as a second fact-finding, administrative tribunal.

We believe the fish and wildlife provisions applied to existing resources should be viewed differently than provisions applied to new resource development. For new resources, a utility can easily avoid the impact of the LTIAP provisions merely by avoiding projects in designated protected areas. We do not intrude into the FERC licensing process; our decision about Intertie access is

known to FERC and the hydro developer before that process begins.

While we agree there is a potential for existing projects to harm BPA fish and wildlife investments, we do not believe there is sufficient evidence to indicate that existing projects are presently operating contrary to the Council's Program or that the Council has been unable or unwilling to implement Program measures applicable to existing projects.

NMFS presented a list of 16 projects with fish and wildlife concerns, but NMFS did not show how those projects conflicted with the Council's Program. The Council provided no evidence that existing projects are in violation of its Program or that the Council had attempted but was unable to rectify problems with FERC's implementation of the Program.

We agree with utility concerns that it will be difficult to negotiate long-term power sales contracts that rely on the Intertie when those contracts can be negated through subsequent action of government agencies. Furthermore, we believe this uncertainty is too great a price to pay, since the Council, fish and wildlife agencies, and tribes can rely on other procedures to ensure that existing projects comply with the Council's program. Given the divisiveness of this issue, the lack of explicit program language applicable to BPA, and the Council's opportunities to work with FERC, we are reluctant to apply the LTIAP to existing hydro projects.

Finally, the LTIAP was never intended to apply to Federal projects. The Council's program already addresses fish and wildlife concerns at these projects. Measures such as the installation of bypass systems depend on Congressional funding; we never proposed to apply the

LTIAP based on budgetary decisions over which we have no control.

ISSUE NO. 6: Should the IAP provide an exemption for PURPA projects?

REFERENCE: 1987 draft policy None
Final LTIAP § 7(b) and § 7(e)

A. *BPA Proposal*

BPA's 1987 draft policy did not recognize any special situation involving hydro projects developed under the Public Utility Regulatory Policies Act of 1978 (PURPA). Utilities raised concerns that PURPA may require them to purchase power from protected area hydro projects developed by others.

B. *Summary of Comments*

The PURPA issue generated many comments from utilities. They are concerned that the 1987 draft policy could reduce Intertie access as a result of actions that utilities could neither avoid nor control.

Several utilities request an exception for PURPA projects. "This aspect of the draft LTIAP must be corrected by exempting Scheduling Utilities from Intertie access reductions where the output of the project in question is acquired under PURPA." WWP, #3-122, p. 14. "Should a PUC decision force a utility to accept an environmentally damaging PURPA resource, BPA should not penalize that utility for the PUC's decision." PNUCC, #3-202, p. 2.

Potential purchasers in California also express concern about the uncertainty provided by our 1987 draft policy. NCPA states:

> Our interest is in making firm power purchases — long-term firm purchases. But with this policy, we could easily find ourselves in a situation where we have entered into contracts with Pacific Northwest utilities only to find that they are unable to make good on those contracts because they've . . . become involved in a project in a protected area or worse yet, they have been forced to purchase QF power from a protected area. NCPA, Tr. 438.

But other commenters argue that providing a blanket exemption would defeat the purpose of BPA policies that seek to prevent licensure and forced purchase of PURPA project power. "Part of what makes forcing a PURPA resource on a utility so improbable is the automatic withdrawal of Intertie access — the automatic reduction in avoided cost that the minimally rational regulators will impose." NRDC, Tr. 671.

NRDC believes that PUCs should deduct the cost of reduced Intertie access from a utility's avoided cost under PURPA, making it highly unlikely that a PURPA hydro project would be constructed. WUTC agrees:

> . . . it is our view that revenue losses associated with the reduced access to the Intertie would lower the avoided cost that a utility would pay for a hydro resource developed in a protected area. We would take the 'total system' approach to calculating avoided costs and recognize that any hydro resource developed in a protected area would result in a loss of benefits associated with use of the Intertie. As a regulatory agency, our response to BPA's proposed policy would be to adjust the avoided costs to reflect these lost benefits. We believe this will result in a limitation of the resources that would be developed in 'protected areas.' WUTC, #3-179, p. 3.

But this view is not shared by the IPUC, which claims: "It is unreasonable for BPA to put PUCs into the position of reconciling conflicting Federal regulations." IPUC, #3-116, p. 3.

The Governor of Oregon identifies several problems with adjusting the avoided cost to reflect a reduction in Intertie access, but concludes: "However, if the penalty provision is retained, the OPUC will make its best efforts to adjust avoided costs to reflect the cost of the penalty to the utility." Governor of Oregon, #3-134, p. 3.

Several utilities state that PUCs are not required to reduce an avoided cost to reflect reduced Intertie access. "The fact is that there is no assurance that the commissions will use their discretion in the manner suggested by the WUTC and, even if the present commissions do, that future commission will continue to do so." ICP, #3-181, p. 3.

NMFS commented that very little adjustment in avoided costs would be necessary, since, " 'avoided costs' are now relatively low compared with the costs of new hydro development and construction. The provisions of the IAP, specifically the automatic decrement requirement, should help to ensure that avoided costs remain relatively low." NMFS, #3-74, p. 2.

C. *Analysis and Decision*

There has been much discussion of possible conflicts between the protected area provision and obligations imposed on utilities by PURPA. This concern is based on a suspicion that state PUCs cannot reflect loss of Intertie access in either the "avoided cost" rates paid to PURPA resource developers or administrative decisions on obligations to interconnect with, and purchase from, PURPA resources.

We conclude from the written comments of the WUTC that the conflict may be overstated. If one PUC has sufficient legal authority to accommodate protected area considerations in its decisions under a Federal statute, we conclude that other state regulators have similar discretion. Any state regulator declining to reflect protected area considerations in its PURPA decisions must therefore have concluded that ratepayers are better off with protected area resources — even at the expense of reduced Intertie access.

If this conflict is real, it will affect only investor-owned utilities. Public systems are self-regulated in the Northwest and, under PURPA, make their own decisions about avoided cost rates and obligations to purchase. It is implausible that public systems will acquire protected area resources at full avoided-cost rates, exposing themselves to diminished Intertie access.

We believe the policy can be crafted to satisfy concerns about PURPA projects without eliminating the disincentive to hydro development in protected areas. A new section 7(e)(1) has been added to the LTIAP.[29]

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[29]The new provision reads:

"*PURPA Projects.* BPA will entertain requests that it not enforce the provisions of section 7 in situations where an investor-owned utility has been compelled to acquire the output of a Protected Area hydroelectric resource under section 210 of the Public Utilities Regulatory Policies Act (PURPA). To qualify for this exception, the investor-owned utility must demonstrate:

(A) that it has exercised all opportunities available under federal and state laws and regulations to decline to acquire the output of the Protected Area resource in question;

(B) that it has petitioned its state regulatory authority(ies) to reduce the rate(s) established under PURPA for purchases from Protected Area resources in recognition of the increased

ISSUE NO. 7: How should the protected area provision be enforced?

REFERENCE: 1987 draft policy § 7(c)
Final LTIAP § 7(b) and § 7(d)

A. *BPA Proposal*

Under the 1986 draft policy, utilities were required to declare the generating resources used to support an Assured Delivery contract. If any of those resources were challenged and found to harm fish and wildlife, BPA would reduce future Assured Delivery or Formula Allocations by an amount equal to the capacity of the offending resource. The 1986 draft LTIAP did not propose to reduce a utility's existing Assured Delivery contracts. The 1986 draft did not explicitly result in reduced Intertie access if BPA and the utility could not agree on a means to reduce fish and wildlife damage.

Fish and wildlife agencies disliked these provisions for three reasons. First, the policy did not apply decrements to existing contracts, allowing a utility to support out-of-region sales with a hydro project that harmed fish. Second, although a utility declared the resources used to support its transactions, we provided no means to monitor these declarations. Third, a utility could blunt the

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costs or reduced revenues caused by operation of section 7(c) of this policy;

(C) that BPA was provided reasonable notice of all relevant regulatory and judicial proceedings to allow for timely intervention in such proceedings; and

(D) after taking all of the foregoing steps and exhausting all reasonable opportunities for judicial review, that it was compelled to acquire the output of a Protected Area hydroelectric resource by final order of FERC or a state regulatory authority issued under PURPA.

effects of decrements by "over-declaring" its resources available for export.

The 1987 draft policy attempted to address these concerns. First, the policy applied an automatic reduction to any utility that built or purchased power from a hydro project located in a protected area. Consequently, it was not necessary to declare resources used to support exports or for BPA to monitor those declarations. Second, decrements were imposed on any transaction utilizing the Intertie during Formula Allocation Condition 1.

B. *Summary of Comments*

California utilities are concerned that Northwest sellers might violate the policy's fish and wildlife provisions in the future, causing an unanticipated loss of power that the buyers are counting on to meet domestic requirements. For example, LADWP comments:

> The party that bears the ultimate risk of a decrement of Assured Delivery is a California purchaser of a long-term firm product from a PNW utility. The idea of entering into the transaction in the first place becomes less attractive. LADWP, Tr. 141.

According to NRDC, the solution is to incorporate those provisions in the contracts themselves, coupled with commitments by the sellers to pay the additional costs of any replacement power that a California utility might be required to purchase as a result of a fish and wildlife violation. NRDC, #3-132, p. 5.

Other commenters maintain it is necessary to apply decrements to existing contracts to provide adequate protection for fish and wildlife:

> PNUCC continues to hold a position which would allow a utility to conclude a firm sale, and gain firm

> access based on an existing surplus and then develop "fish-killer" resources to support the sale. We continue to insist that the enforcement mechanism must deter such development by promising to decrement allocations for existing contracts, as well as for proposed new contracts, if the utility develops resources in violation of the fish and wildlife provisions of the policy. NCAC, #3-206, p. 2.

Similar comments are made by the Idaho Attorney General. IAG, #3-126, p. 1.

Several utilities suggest that we not apply a decrement to Formula Allocations. For example:

> Bonneville's proposal to reduce the formula allocation by the full amount of any new hydroelectric capacity in a Protected Area is an arbitrary and severe penalty based on the erroneous assumption that all of the output of the project in the Protected Area would be the power which would otherwise be transmitted on the Intertie. PSP&L, #3-117, p. 11.

CRITFC and others object to eliminating decrements applied under Conditions 2 and 3:

> From the standpoint of fish and wildlife protection, it is just as important that the deterrent value of access proscriptions be applied to conditions 2 and 3, as it is that they be applied to condition 1. CRITFC, #3-204, p. 4.

C. *Analysis and Decision*

In keeping with our decision to utilize the protected area concept in the LTIAP, enforcement mechanisms should be easy to administer and relatively noncontroversial. Automatic reductions to Condition 1 allocations appear to satisfy these objectives. Because of the relation-

ship between Assured Delivery and Formula Allocation capacity created by the LTIAP mitigation provisions, this means that long-term firm transactions are potentially affected as well as spot-market sales.

Now that we have created an exception for protected-area projects that are forced upon utilities under PURPA and eliminated coverage of existing hydro resources, any uncertainty for long-term utility transactions should be minimal. Sellers and buyers have adequate means to reduce uncertainty. Buyers may insist on contract language obligating Northwest sellers to refrain from constructing hydro projects in protected areas.

It makes little sense to impose protected area decrements in Conditions 2 and 3. Under the experiment established by LTIAP section 5(d), it would be difficult to impose decrements when utilities cease to receive pro-rata shares of Intertie capacity. Consequently, the LTIAP provides for decrements only under Condition 1 when we have identifiable allocations for each utility. However, if section 5(d) is not continued after its 18-month experimental period, we may reopen the policy to apply decrements to allocations made under Conditions 2 and 3.

PART FIVE

OVERALL EFFECTS OF THE LONG-TERM INTERTIE ACCESS POLICY

It should be apparent from the foregoing discussion that resolving long-term policy issues has been an exercise in balancing conflicting expectations about how benefits and burdens of the Federal Columbia River power and transmission systems should be allocated among various interest groups. Each group wants more for itself, usually at the expense of other contenders. Each group supports

its claim by referencing a favorite statutory provision or excerpt from legislative history.

Northwest interests vary among public and investor-owned generating utilities; nongenerating utilities and aluminum companies that purchase their total power requirements from BPA; and groups especially concerned about fish and wildlife protection. Some generating utilities want more transmission capacity for long-term power transactions with California. Others emphasize a demand that long-term transactions not interfere with their desire to utilize the Intertie for short-term, spot-market sales. Nongenerating utilities and the aluminum companies are wary of any non-Federal usage of the Intertie, fearing that this would reduce BPA's power sales and thereby increase our rates to them. Energy-intensive aluminum producers are especially concerned about keeping the price of their product competitive on world markets. Environmental interests want to ensure that no one's demands are satisfied in ways that jeopardize fish.

In California, utilities and regulators want access to more of the Federal Intertie for a greater variety of firm power transactions. They want "pro-competitive" access for spot-market transactions, while overlooking the existing anticompetitive practices on the California portion of the Intertie.

At the Federal level, the Office of Management and Budget insists that BPA take steps to ensure prompt repayment of its Treasury obligations. There is a serious concern that BPA actions, at the very least, not exacerbate the Federal deficit. We have stated clearly throughout the development of the IAP that one of our main goals has been to help BPA repay the U.S. Treasury. This position has been judicially upheld in *Department of Water & Power v. BPA*, 759 F.2d 684 (9th Cir. 1985). However,

parties still disagree about the role BPA should take in managing and operating the Intertie to meet its fiscal goal.

Few of the demands made on us are typical of those a non-Federal utility would expect to honor. Each utility and customer group looks to the Intertie to support its own revenues or lower its costs. Environmental groups advance important agenda as well. And, Congress seems disinclined to forgive any of its $8 billion loaned to the Northwest's Federal power system.

The sum of all these demands far exceeds the finite limitations of the resource. In fact, many of the demands are mutually exclusive. This sometimes subtle, yet important, point must be appreciated to better understand the complex nature of the balance we have reached in the LTIAP.

Two tables discussed below demonstrate this balance of benefits. Table 1 is drawn from section I.3 of the Intertie Development and Use Environmental Impact Statement (IDU EIS). It shows the 20-year distribution of benefits based on three different alternatives: no Intertie access policy, the LTIAP, and a Federal-first policy. This long-term analysis is more meaningful than an individual-year showing, which could be significantly distorted by weather or other short-term phenomena.

Several conclusions about the balance of competing interests are evident from this table. We believe Table 1 shows that the LTIAP achieves a sense of equity between the regions and among customer groups, while maintaining our ability to meet BPA's obligations to the Treasury.

TABLE 1
Intertie Access Policy Alternatives
Comparison of Firm and Nonfirm Benefits

	Pre-IAP[1]		LTIAP[2]		Federal-First	
	$000,000	%	$000,000	%	$000,000	%
BPA[3]	3,063	32	3,630	37	4,394	46
PNW Non-Federal	360	4	1,237	12	5,386	
Total PNW	3,423	36	4,867	49	4,932	52
California	5,504	58	4,438	45	3,992	42
Canada	599	6	599	6	574	6
Total	9,525	100	9,904	100	9,497	100

[1]Assumes Federal Marketing contracts (1550 MW).

[2]Assumes 800 MW of Assured Delivery contracts (1950).

[3]Assumes BPA receives 60 percent of PNW secondary revenues in the Pre-IAP and Proposed options and 70 percent in the Federal-First option.

First, Table 1 shows that we have not maximized Federal revenues in the LTIAP compared with revenues that might be achieved under a Federal-first policy. Increased Intertie usage by non-Federal utilities comes at the expense of our total requirements customers and, if the DSIs or other elements of the Northwest economy falter, the U.S. Treasury. However, both our customers and the Treasury are better off under the LTIAP than they would be if no policy were adopted.

Second, the LTIAP produces a closer sharing of benefits between the Northwest and California (49 percent *vs.* 45 percent) than would be the case absent a policy (59 percent *vs.* 35 percent). Disparity of benefits was a major concern expressed by the CEC. CEC, #3-218, pp. 36-38; *see* pp. , above.

The LTIAP interregional balance is not the exact parity, which PG&E suggested would be ideal. PG&E, #3-188, DFI appendix, p. B-3. We doubt that exact parity would be realistic or that a claim of exact parity would be credible. However, two elements of the policy not reflected in Table 1 should move us even more in that direction. The LTIAP's section 5(d) experiment should reduce Northwest benefits and increase California benefits (this will tend to be offset by removal of restrictions on usage of California's portion of the Intertie). Also, our offer to pursue share-the-savings pricing could have a similar result. Neither of these two elements is capable of reliable quantification at this time.

Third, benefits to Northwest non-Federal utilities increase under the LTIAP relative to both the "pre-IAP" and "Federal-first" alternatives. Part of this improvement is explained by the availability of Assured Delivery service; part is due to Formula Allocation procedures. We expect the latter effect to be tempered by the section 5(d) experiment.

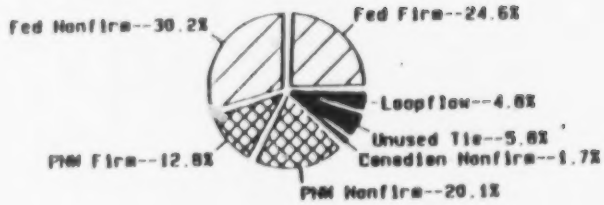
Fourth, Canadian access remains constant over the three alternatives. However, opportunities for increased long-term and short-term access are made available under section 6 of the LTIAP.

Table 2 is a set of pie charts that summarize a study BPA recently made to show expected usage of the Intertie — by BPA, Northwest utilities and Canada — or long-term and short-term transactions. The year 1992 was used for this analysis. For purposes of comparison, three different amounts of Assured Delivery service (0 MW, 400 MW, and 800 MW) have been assumed. This comparison tracks the evolution of Assured Delivery service from the near-term to the interim and, finally, the long-term access policy.

Table 2 clearly shows the shift in usage from Federal to non-Federal as we make more Assured Delivery service available for long-term interregional power transfers. This increased Assured Delivery service also comes at the expense of non-Federal utilities that deal only in the spot market.

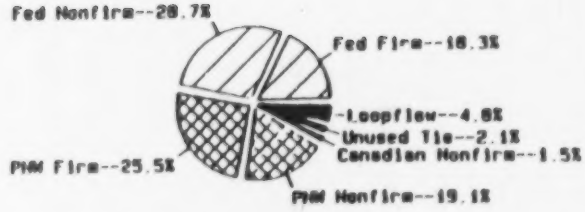
Interlie Use
Terminal Expansion
June 1992

Table 2



0 MW
Assured Delivery

400 MW
Assured Delivery



800 MW
Assured Delivery

We should address two additional points not reflected in Table 2. First, non-Federal usage may increase beyond 800 MW after we revisit the demand for long-term, firm wheeling as promised in LTIAP section 4(c)(1). Second, as noted above, Canadian utilities may gain access for long-term firm or spotmarket sales under LTIAP section 6.

In summary, the LTIAP by necessity is a compromise solution to the conflicting demands placed on the Intertie. No one customer group, including BPA, receives all that it may want or may believe is statutorily guaranteed. Each group, however, receives an equitable and fair share.

* * *

I have reviewed and hereby approve this decision to adopt the Long Term Intertie Access Policy appended hereto.

Issued in Portland, Oregon, May 17, 1988.

James J. Jura
Administrator

REVISED DRAFT

LONG-TERM INTERTIE
ACCESS POLICY

GOVERNING TRANSACTIONS
OVER FEDERALLY OWNED
PORTIONS OF THE
PACIFIC NORTHWEST-
PACIFIC SOUTHWEST
INTERTIE

U.S. DEPARTMENT OF
ENERGY
BONNEVILLE POWER
ADMINISTRATION
DECEMBER 15, 1987

LONG-TERM INTERTIE
ACCESS POLICY

GOVERNING TRANSACTIONS
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PACIFIC NORTHWEST-
PACIFIC SOUTHWEST
INTERTIE

U.S. DEPARTMENT OF
ENERGY
BONNEVILLE POWER
ADMINISTRATION
MAY 17, 1988

REVISED DRAFT LONG-TERM INTERTIE ACCESS POLICY

Section 1. *Definitions*

1. "Administrator" means the Administrator of Bonneville Power Administration (BPA) and is used interchangeably with BPA.

2. "Administrator's Power Marketing Program" refers to all marketing actions taken and policies developed to fulfill BPA's statutory obligations. These actions and policies are based on exercises of broad authority to act, consistent with sound business principles, to recover revenue adequate to amortize Federal investments in the Federal Columbia River power and transmission systems, while encouraging diversified use of electric power at the lowest practical rates. In the Northwest, the Administrator's Power Marketing Program includes BPA's power supply obligations and programs to market surplus power in a manner that assures an adequate, reliable, economical, efficient, and environmentally acceptable power supply, while preserving regional and public preference to Federal electric power. In the Southwest, the Administrator's Power Marketing Program includes the Administrator's programs to market surplus Federal power at equitable prices and to assist in marketing the Northwest's non-Federal power surplus.

3. "Assured Delivery" means firm Intertie transmission service provided by BPA under a transmission contract to wheel power cov-

FINAL LONG-TERM INTERTIE ACCESS POLICY

Section 1. *Definitions*

1. "Administrator" means the Administrator of Bonneville Power Administration (BPA) and is used interchangeably with BPA.

2. "Administrator's Power Marketing Program" refers to all marketing actions taken and policies developed to fulfill BPA's statutory obligations. These actions and policies are based on exercises of authority to act, consistent with sound business principles, to recover revenue adequate to amortize investments in the Federal Columbia River power and transmission systems, while encouraging diversified use of electric power at the lowest practical rates. In the Northwest, the Administrator's Power Marketing Program covers BPA's obligations to provide an adequate, reliable, economical, efficient, and environmentally acceptable power supply, while preserving public preference to Federal power. In the Southwest, the Administrator's Power Marketing Program covers activities to market surplus Federal power at equitable prices, while preserving regional and public preference to Federal power, and to assist in marketing Northwest nonfederal power.

3. "Allocation" means the share of the Intertie Capacity made available for short-term sales of energy.

4. "Assured Delivery" means firm transmission service provided by BPA under a transmission contract to wheel power covered by a

ered by a contract between a Scheduling Utility and a Southwest utility. Assured Delivery contracts may not exceed 20 years' duration. The service is interruptible only in the event of an uncontrollable force or a determination made pursuant to section 7 or 8 of this policy. Assured Delivery service will be reduced only by the amount of transmission capacity to the Southwest later acquired by a Scheduling Utility through ownership or contract.

4. "BPA Resources" means Federal Columbia River Power System hydroelectric projects; resources acquired by BPA under long-term contracts, including resources acquired pursuant to sections 5(c) and 6 of the Northwest Power Act; and resources acquired pursuant to section 11(b)(6)(i) of the Federal Columbia River Transmission System Act.

contract between a Scheduling Utility and a Southwest utility. Assured Delivery contracts may not exceed 20 years in duration. The service is interruptible only in the event of an uncontrollable force or a determination made pursuant to sections 7 or 8 of this policy.

5. "Available Intertie Capacity" is defined as the physically available capacity controlled by BPA, reduced by the capacity reserved under Section 2 of this policy and the capacity necessary to satisfy Assured Delivery contracts not subject to operational mitigation requirements under this policy.

6. "BPA Resources" means Federal Columbia River Power System hydroelectric projects; resources acquired by BPA under long-term contracts; and resources acquired pursuant to section 11(b)(6)(i) of the Federal Columbia River Transmission System Act.

7. "Exchange" refers to various types of transactions that take advantage of diversity between Northwest and Southwest loads through deliveries of firm power, at prespecified delivery rates, from North to South during the Southwest's peak demands and returns of capacity and/or energy from South to North during other times. Transactions vary depending on the lag between deliveries and returns. A "naked capacity" transaction might require off-peak energy

returns within 24 hours, whereas a seasonal exchange might call for firm power returns within 6 months.

5. "Extraregional Utilities" are generating utilities, or divisions thereof, that do not provide retail electric service and own or operate significant amounts of generating capacity in the Northwest.

8. "Extraregional Utilities" are generating utilities, or divisions thereof, that do not provide retail electric service and do not own or operate significant amounts of generating capacity in the Northwest.

6. "FD Supported Sale" means that portion of a Scheduling Utility's firm sale equal, in amount and shape, to the utility's purchase of BPA Firm Displacement power.

7. "Formula Allocation" means the shares of Intertie Capacity made available to Scheduling Utilities and, under certain conditions, Extraregional Utilities for short-term sales of energy.

9. "Formula Allocation" means the process by which Intertie Capacity made available for short-term sales of energy.

8. "Intertie" means the two 500-kilovolt (kV) alternating current (AC) transmission lines and one 1,000-kV direct current (DC) line, which extend from Oregon into California or Nevada, and any additions thereto identified by BPA as Pacific Northwest-Pacific Southwest Intertie facilities.

10. "Intertie" means the two 500-kv alternating current (AC) transmission lines and one 1000 kv direct current (DC) line, which extend from Oregon into California or Nevada, and any additions thereto identified by BPA as Pacific Northwest-Pacific Southwest Intertie facilities.

9. "Intertie Capacity" means the North to South transmission capacity of the Intertie controlled by BPA through ownership or contract; increased by power scheduled South to North, decreased by loop flow, outages, and other factors that reduce transmission capacity; and further decreased by Pacific Power & Light Company's schedules, under its scheduling rights at the Malin substation (BPA Contract Nos. DE-MS79-86BP92299 and DE-MS79-79BP90091).

11. "Intertie Capacity" means the North to South transmission capacity of the Intertie controlled by BPA through ownership or contract; increased by power scheduled South to North, decreased by loop flow, outages, and other factors that reduce transmission capacity; and further decreased by Pacific Power & Light Company's schedules, under its scheduling rights at the Malin substation (BPA Contract Nos. DE-MS79-86BP92299 and DE-MS79-79BP90091).

10. "Mitigation" refers to the conditions, other than rate schedule provisions, imposed by BPA on a Scheduling Utility in return for an Assured Delivery contract. Mitigation helps offset operational and economic problems, attributable to a Scheduling Utility's power transaction, that inhibit BPA's ability to meet its existing firm load obligations or to generate revenues. The Mitigation measures specified in this policy must be included in all Assured Delivery contracts, unless substitute measures are negotiated with BPA on a case-by-case basis.

11. "Nonscheduling Utility" means a non-Federal Northwest utility that owns a generating resource, but does not operate a generation control area within the Pacific Northwest. A Nonscheduling Utility requesting Intertie access for its resource must do so through the Scheduling Utility (or BPA) in whose control area the resource is located.

12. "Pacific Northwest" (or "Northwest") is defined in the Northwest Power Act, 16 U.S.C. § 839e, as the states of Oregon, Washington, and Idaho; the portion of Montana west of the Continental Divide; portions of Nevada, Utah, and Wyoming within the Columbia River drainage basin; and any contiguous service territories of rural electric cooperatives serving inside and outside the Pacific Northwest, not more than 75 air miles from the areas referred to above, that were served by BPA as of December 1, 1980.

13. "Protected Area" means a stream reach within the Columbia River drainage basin specially protected from hydroelectric development because of the presence of

12. "Mitigation" refers to the requirements imposed by BPA on a utility in return for an Assured Delivery contract. Mitigation helps offset operational and economic problems, attributable to a Scheduling Utility's firm power transaction, that inhibit BPA's ability to generate revenues. The Mitigation measures specified in this policy must be included in all Assured Delivery contracts, unless a scheduling utility either agrees to a specially designed charge or negotiates substitute measures with BPA on a case-by-case basis.

13. "Nonscheduling Utility" means a nonfederal Northwest utility that owns a Qualified Northwest Resource, but does not operate a generation control area within the Pacific Northwest. A Nonscheduling Utility requesting Intertie access for its resource must do so through the Scheduling Utility (or BPA) in whose control area the resource is located.

14. "Pacific Northwest" (or "Northwest") is defined in the Northwest Power Act, 16 U.S.C. § 839e, as the states of Oregon, Washington, and Idaho; the portion of Montana west of the Continental Divide; portions of Nevada, Utah, and Wyoming within the Columbia River drainage basin; and any contiguous service territories of rural electric cooperatives serving inside and outside the Pacific Northwest, not more than 75 air miles from the areas referred to above, that were served by BPA as of December 1, 1980.

15. "Protected Area" means a stream reach within the Columbia River drainage basin specially protected from hydroelectric development because of the presence of

anadromous or high value resident fish, or wildlife. Protected areas may also include stream reaches which could support anadromous fish if investments were made in habitat, hatcheries, passage, or other projects. This policy contemplates that BPA will implement, after review and possible modification, a comprehensive protected area program adopted by the Pacific Northwest Electric Power and Conservation Planning Council.

14. "Qualified Extraregional Resources" means:

(a) A generating unit located outside the Northwest that was in commercial operation on the effective date of this policy. However, the term excludes the portions of units covered as Qualified Northwest Resources.

(b) after the Administrator has determined that the capacity of the Intertie is rated at approximately 7,900 MW, all resources located outside of the Northwest, other than the portions of extraregional resources covered as Qualified Northwest Resources.

15. "Qualified Northwest Resources" exclude BPA Resources, but include:

(a) Generating resources located inside the Northwest that were in commercial operation on the effective date of this policy. Regarding generating resources owned or controlled by Nonscheduling Utilities, it must be demonstrated that a relationship had been established by that date with a Scheduling Utility or BPA to serve Northwest loads.

(b) Scheduling Utility extraregional generating resources dedicated to Northwest loads on the

anadromous or high value resident fish, or wildlife. Protected areas may also include stream reaches which could support anadromous fish if investments were made in habitat, hatcheries, passage, or other projects.

16. "Qualified Extraregional Resource" means:

(a) a generating unit located outside the Northwest that was in commercial operation on the effective date of this policy. However, the term excludes portions of units covered as Qualified Northwest Resources.

(b) after BPA has determined that the capacity of the Intertie is rated at approximately 7,900 MW, all resources located outside of the Northwest, other than the portions of extraregional resources covered as Qualified Northwest Resources.

17. "Qualified Northwest Resource" excludes BPA Resources, but includes:

(a) Resources located inside the Northwest that are in commercial operation as of the effective date of this policy.

(b) Scheduling Utility extraregional generating resources dedicated to Northwest loads on the

effective date of this policy. This term includes pro rata portions of Montana Power Company's and Pacific Power and Light Company's shares of the Colstrip No. 4 generating station, based on the ratio of their respective regional loads to their respective total loads; and Idaho Power Company's share of Valmy No. 2.

(c) New regional resources of Scheduling Utilities, except for hydroelectric resources located in Protected Areas, needed to support power contracts receiving Assured Delivery service under this policy.

16. "Resource" means an identified electric generating unit or stack of particular electric generating units identified to supply power or capacity for sale over the Intertie.

17. "Scheduling Utility" means the Northwest portion of a non-Federal utility that operates a generation control area within the Northwest.

18. "Seasonal Exchange" means a transaction that takes advantage of seasonal diversity between Northwest and Southwest loads through transfers of firm power, at a prespecified delivery rate, from North to South during the Southwest's summer load season and from South to North during the Northwest's winter load season. Seasonal Exchanges may involve

effective date of this policy. This term includes pro rata portions of Montana Power Company's and Pacific Power and Light Company's shares of the Colstrip No. 4 generating station, based on the ratio of their respective regional loads to their respective total loads; and Idaho Power Company's share of Valmy No. 2.

(c) New regional resources of Scheduling Utilities, except for hydroelectric resources located in Protected Areas.

18. "Resource" means an electric generating unit or stack of particular electric generating units identified to supply power or capacity for sale over the Intertie.

19. "Scheduling Utility" means the Northwest portion of a nonfederal utility that operates a generation control area within the Northwest, or any utility designated as a BPA "computed requirements customer." The term excludes Utah Power & Light Company, either as a separately owned company or as a division of another corporation, which has sufficient transmission capacity to the Southwest without access to the Federal Intertie.

20. "Seasonal Exchange" means a transaction that takes advantage of seasonal diversity between Northwest and Southwest loads through transfers of firm power, at a prespecified delivery rate, from North to South during the Southwest's summer load season and from South to North during the Northwest's winter load season. Seasonal Exchanges may involve

payments of additional consideration to reflect the relative seasonal values of power throughout the western United States. Seasonal Exchange schedules of Northwest utilities will be referred to as "deliveries," and schedules of Southwest utilities will be referenced as "returns." A Scheduling Utility must be able to support its summertime firm power deliveries with generating resources that are surplus to its Northwest requirements. The sum of a Scheduling Utility's energy resources for each month in which deliveries are made (with special concern for August) must exceed its corresponding Northwest loads by an amount sufficient to support the Seasonal Exchange.

19. "Section 9(i)(3) resource" means a Scheduling Utility resource that BPA has granted priority in receiving BPA transmission, storage and load factoring services.

Section 2. *Intertie Capacity Reserved for BPA*

The Administrator reserves for BPA's use Intertie Capacity sufficient to:

(a) deliver the full amount of BPA's surplus firm power,

(b) perform obligations under existing BPA transmission contracts listed in Exhibit C, to the extent such obligations differ from the conditions specified in this policy, and

(c) provide Assured Delivery service for transactions not subject to limits under Exhibit B to this policy.

payments of additional consideration to reflect the relative seasonal values of power throughout the western United States. Seasonal Exchange schedules of Northwest utilities will be referred to as "deliveries," and schedules of Southwest utilities will be referenced as "returns." A Scheduling Utility must be able to support its summertime firm power deliveries with generating resources that are surplus to its Northwest requirements. The sum of a Scheduling Utility's energy resources for each month in which deliveries are made (with special concern for August) must exceed its corresponding Northwest loads by an amount sufficient to support the Seasonal Exchange.

21. "Section 9(i)(3) resource" means a Scheduling Utility resource that BPA has granted priority in receiving BPA transmission, storage and load factoring services as defined in §9(i)(3) of the Northwest Power Act.

Section 2. *Intertie Capacity Reserved for BPA*

The Administrator reserves for BPA's use Intertie Capacity sufficient to:

(a) transmit all of BPA's surplus firm power and to serve other obligations,

(b) perform obligations, including, but not limited to, the existing transmission contracts listed in Exhibit C, to the extent such obligations differ from the conditions specified in this policy, and

(c) provide Assured Delivery service for transactions not subject to limits under Exhibit B to this policy, and

(d) satisfy firm obligations that have not been prescheduled, by using unutilized portions of Formal Allocation amounts.

Section 3. *Conditions for Intertie Access*

(a) All Intertie access will be granted pursuant to the conditions and procedures of this policy, unless otherwise specified in the three existing BPA transmission contracts listed in Exhibit C.

(b) BPA will provide Intertie access only for BPA Resources and the Qualified Northwest Resources of Scheduling Utilities, except to the extent that Qualified Extraregional Resources are permitted access under this policy.

(c) BPA will provide Assured Delivery and allocate remaining Intertie Capacity when providing such access will not substantially interfere with operating limitations of the Federal system. Examples of these limitations, which reflect BPA's obligation to operate in an economical and reliable manner consistent with prudent utility practices, include:

(1) The BPA realiability criteria and standards,

(2) Western Systems Coordinating Council minimum operating reliability criteria,

(3) North American Electric Reliability Council Operating Committee minimum criteria for operating reliability, and

(4) coordination agreements among BPA, scheduling utilities and other Federal agencies regarding resource and river operations.

Section 3. *Conditions for Intertie Access*

(a) All Intertie access will be granted pursuant to the conditions and procedures of this policy, unless otherwise specified in the three existing BPA transmission contracts listed in Exhibit C.

(b) BPA will provide Intertie access only for BPA Resources and the Qualified Northwest Resources of Scheduling Utilities, except to the extent that Qualified Extraregional Resources are permitted access under this policy.

(c) BPA will provide Assured Delivery and allocate remaining Intertie Capacity when providing such access will not substantially interfere with operating limitations of the Federal system. Examples of these limitations, which reflect BPA's obligation to operate in an economical and reliable manner consistent with prudent utility practices, include:

(1) The BPA Reliability Criteria and Standards,

(2) Western Systems Coordinating Council minimum operating reliability criteria,

(3) North American Electric Reliability Council Operating Committee minimum criteria for operating reliability, and

(4) coordination agreements among BPA, scheduling utilities and other Federal agencies regarding resource and river operations.

(d) Any utility that has contractual or ownership rights to transmission capacity to Southwest utilities must be fully utilizing such capacity prior to receiving any access to BPA Intertie Capacity.

Section 4. *Assured Delivery for Intertie Access*

Subject to the limitations and other conditions in this section and in other sections of this policy, BPA has determined that it can provide Assured Delivery to Scheduling Utilities without causing substantial interference with the Administrator's Power Marketing Program.

(a) *Access For Utilities Owning Or Controlling Southwest Interconnections.* Assured Delivery is intended primarily for Scheduling Utilities which lack interconnections with the Southwest. A utility with transmission access to Southwest utilities, through contract or ownership, must utilize all such capacity on a firm basis before receiving any Assured Delivery. A utility is eligible for Assured Delivery only to the extent that the sum of its Exhibit B amounts exceeds its own transmission capacity to the Southwest.

(d) Any utility that has contractual or ownership rights to Pacific Northwest-Pacific Southwest Intertie capacity or to other transmission lines to California or the Southwest market must fully utilize such capacity prior to receiving any access to BPA's Intertie Capacity. If a Scheduling Utility with Intertie rights needs BPA Intertie Capacity to reach a particular Southwest utility, BPA will consider negotiated swaps of capacity to accommodate such requests.

Section 4. *Assured Delivery for Intertie Access*

Subject to the limitations and other conditions in this section and in other sections of this policy, BPA has determined that it can provide limited Assured Delivery to Scheduling Utilities without causing substantial interference with the Administrator's Power Marketing Program.

(a) *General Provisions*

(1) *Existing Transmission Contracts.* BPA will provide Assured Delivery for the remaining terms of the firm power sale and Seasonal Exchange contracts identified in Exhibit C to this policy.

(2) *Utilities Owning Or Controlling Southwest Interconnections.* Assured Delivery is intended primarily for Scheduling Utilities which lack interconnections with the Southwest. Except for transactions covered by section 4(b) of this policy, a utility with capacity on an intertie, through contract or ownership, must utilize all such capacity on a firm basis before receiving any Assured Delivery.

(3) *Nature of Transactions.* BPA will not provide Assured Delivery for transactions which a Scheduling Utility cannot demonstrate to be other than an advance arrangement to sell nonfirm energy.

(b) *Waiver Of BPA Service Obligation.* Assured Delivery contracts must contain a waiver of BPA's obligation under the Scheduling Utility's power sales contract, up to the amount of power for which firm Intertie access is provided.

(4) *Waiver Of BPA Service Obligation*

(A) *Hydroelectric Resources.* Assured Delivery contracts that facilitate the export disposition of Northwest hydroelectric energy shall provide, under 16 U.S.C. § 837b(d), for a reduction of BPA's power sale contract obligation to the Northwest utility, for the period of the disposition, equal to the amount of energy for which Assured Delivery is provided.

(B) *Thermal Resources.* Assured Delivery contracts that facilitate the export disposition of Northwest thermal energy shall provide, under 16 U.S.C. § 839f(c), for a reduction of BPA's power sale contract obligation to the Northwest utility, for the period of the disposition, equal to the amount of energy for which Assured Delivery is provided. Such reduction shall become effective at the time BPA determines that it has reached energy load/resource balance, or at a date as specified in the Assured Delivery contract.

(5) *Exchange Contracts.* Exchange contracts must specify that all return energy be scheduled to either the AC Intertie point of interconnection at the California-Oregon border ("COB") or the DC Intertie point of interconnection at the Nevada-Oregon border ("NOB"). Exchange contracts must also specify prescheduled determinations of hourly energy returns.

(c) *Transactions Not Subject To Exhibit B Limits Under This Policy*

(1) *Joint Ventures.* Joint ventures between BPA and utilities, such as firm displacement contracts, which allow BPA to increase its sales of surplus power qualify for Assured Delivery.

(2) *Sales In Lieu Of Exchanges.* BPA may offer to satisfy Scheduling Utility demands for Seasonal Exchanges by selling them incremental amounts of surplus firm power during winter months. Upon committing to purchase such incremental firm power at negotiated prices that reflect BPA's lost opportunities for summer sales, a Scheduling Utility will qualify for Assured Delivery (with mitigation) to wheel an equal amount of firm capacity and energy over the Intertie during summer months.

(3) *Conditions.* A Scheduling Utility may request at any time the Assured Delivery of transactions identified in sections 4(c)(1) and 4(c)(2). Relevant contracts must be presented for review when Assured Delivery is requested. BPA will satisfy a request within 60 days after a Scheduling Utility has demonstrated satisfaction of the requirements of this policy.

(d) *Transactions Subject To Exhibit B Limits Under This Policy*

(1) *Maximum Amounts Of Assured Delivery.* BPA will provide 800 MW of Assured Delivery for transactions, limited by Exhibit B amounts, that are identified in this

(6) *Satisfying Requests For Assured Delivery.* All relevant power contracts must be presented for review no later than the date on which a request for Assured Delivery is made.

(b) *New Transactions Not Subject To Capacity Limits*

(1) *Joint Ventures.* Joint ventures between BPA and utilities, such as firm displacement contracts, which allow BPA to increase its sales of surplus power qualify for Assured Delivery.

(2) *Sales In Lieu Of Exchanges.* BPA may offer to satisfy Scheduling Utility demands for Seasonal Exchanges by selling them incremental amounts of surplus firm power during winter months. Upon committing to purchase such incremental firm power at negotiated prices that reflect BPA's lost opportunities for summer sales, a Scheduling Utility will qualify for Assured Delivery (with mitigation) to wheel an equal amount of firm capacity and energy over the Intertie during summer months.

(3) *Conditions.* A Scheduling Utility may request at any time the Assured Delivery of transactions identified in sections 4(b)(1) and 4(b)(2). Relevant contracts must be presented for review when Assured Delivery is requested. BPA will satisfy a request within 60 days after a Scheduling Utility has demonstrated satisfaction of the requirements of this policy.

(c) *Transactions Subject To Capacity Limits Under This Policy*

(1) *Maximum Amounts Of Assured Delivery.* BPA will provide 800 MW of Assured Delivery for firm power sales and Exchanges identified in this policy. BPA will

policy. BPA will determine the amount of any additional Assured Delivery increment after conclusion of the Third AC participation process. Moreover, the 800 MW amount may be subject to some reduction if the DC terminal expansion project is not completed on schedule.

(2) *Firm Power Sales*

(A) *Existing Transmission Contracts.* BPA will provide Assured Delivery for the remaining term of the firm power sale contract identified in Exhibit C to this policy.

(B) *Exhibit B amounts.*

(i) *Current maximum.* Each Scheduling Utility's maximum Assured Delivery amount for firm sales equals its average firm energy surplus, shown in Exhibit B to this policy. Except for Montana Power Company (MPC), Exhibit B represents projected Scheduling Utility surpluses for the 1988-89 operating year. In satisfaction of all obligations to MPC under Northwest Power Act section 9(i)(3). MPC's Exhibit B amount is set at 105 MW to facilitate long-term sales of firm power from its share of the Colstrip No. 4 coal-fired generating station.

(ii) *Future changes.* BPA may, at its discretion, revise Exhibit B to reflect changes in the firm power surpluses of individual utilities; however, the 361 MW Exhibit B average firm surplus total is reassess the amount of Assured Delivery capacity when the 3d AC Intertie project is either completed or abandoned. Moreover, the 800 MW amount may be subject to some reduction if the DC Terminal Expansion project is not completed on schedule.

(2) *Exhibit B amounts*

(A) *Current maximum.* Each Scheduling Utility's maximum Assured Delivery amount for firm sales equals its average firm energy surplus, shown in Exhibit B to this policy. BPA will reserve capacity equal to each Scheduling Utility's Exhibit B allocation subject to section 4(c)(2)(D) below. Except for Montana Power Company (MPC), Tacoma City Light, and Cowlitz County Public Utility District, Exhibit B represents projected Scheduling Utility surpluses for the 1988-89 operating year. In satisfaction of all obligations to MPC under Northwest Power Act section 9(i)(3), MPC's Exhibit B amount is set at 105 MW to facilitate long-term sales of firm power from its share of the Colstrip No. 4 coal-fired generating station. Exhibit B amounts for Tacoma and Cowlitz are increased to accommodate existing firm power transactions.

(B) *Shaping.* Firm power sales eligible for Assured Delivery may be shaped within the following ranges. During the months of September through December, a Scheduling Utility may deliver firm

not subject to increase. Any unutilized Assured Delivery amount is revoked if, upon revision, a utility's individual Exhibit B amount has declined or if a utility has sold firm power to another utility seeking to increase its Exhibit B average firm surplus amount. A Scheduling Utility may increase its individual Exhibit B amount by purchasing surplus firm power from BPA or any Scheduling Utility with an Exhibit B amount.

(iii) *Nature Of Transactions.* BPA will not provide Assured Delivery for transactions which a Scheduling Utility cannot demonstrate to be other than an advance arrangement to sell nonfirm energy. Nonfirm energy transactions may receive Intertie access only under section 5 of this policy.

(C) *Shaping.* Firm power sales eligible for Assured Delivery may be shaped within the following ranges. During the months of September through December, a Scheduling Utility may deliver firm energy at a rate up to 1.8 times its Exhibit B average firm surplus amount. During the months of January through August, a Scheduling Utility may delivery firm energy at a rate no greater than 1.0 times its Exhibit B amount. However, total delivered energy may not exceed the Exhibit B annual firm energy maximum.

(3) *Seasonal Exchanges*

(A) *Existing Contracts.* BPA will provide Assured Delivery for the remaining term of the Seasonal Exchange contracts identified in Exhibit C to this policy.

energy at a rate up to 1.8 times its Exhibit B average firm surplus amount. During the months of January through August, a Scheduling Utility may deliver firm energy at a rate no greater than 1.0 times its Exhibit B amount. However, total delivered energy may not exceed the Exhibit B annual firm energy maximum.

(C) *Other uses of Exhibit B amounts.* BPA will not entertain Assured Delivery requests for firm power sales in excess of a utility's Exhibit B maximum. However, a Scheduling Utility may use any portion of its Exhibit B maximum, not used for firm power sales, for exchange transactions supported by Qualified Northwest Resources.

(D) *Future changes.* BPA may, at its discretion, revise Exhibit B to reflect changes in the firm power surpluses of individual utilities; however, the Exhibit B average firm surplus total is not subject to increase. Any unutilized Assured Delivery amount will be revoked, if, upon revision, a utility's individual Exhibit B amount has declined or if a utility has sold firm power to another utility seeking to increase its Exhibit B average firm surplus amount. A Scheduling Utility may increase its individual Exhibit B amount by purchasing surplus firm power from BPA or any Scheduling Utility with an Exhibit B amount.

(3) *Other Capacity.* The remaining capacity available for Assured Delivery under this policy is offered to Scheduling Utilities, on a first-come, first-served basis, for Exchange transactions supported

(B) *Exhibit B Amounts.* Subject to the individual utility Seasonal Exchange maximums in Exhibit B, BPA will provide Assured Delivery to facilitate Seasonal Exchanges of Qualified Northwest Resources. The current Exhibit B (representing Intertie Capacity Available for Assured Delivery) is subject to revision at the discretion of BPA.

(4) *Mitigation*

(A) *Firm Sales And Seasonal Exchange Deliveries.* During any hour in which BPA has invoked Condition 1 allocation procedures to preschedule energy deliveries, each utility's Assured Delivery amount shall be deducted from its formula allocation to determine its share of energy scheduled on the Intertie. If the remainder is negative for a given utility, then that utility must purchase sufficient energy from BPA, at BPA's then-applicable rate, to make up the difference.

(B) *Seasonal Exchange Returns*

(i) *Returns.* Exchange contracts must specify that all return energy be scheduled to either the AC Intertie point of interconnection at the California-Oregon border ("COB") or the DC Intertie point of interconnection at the Nevada-Oregon border ("NOB"). Exchange contracts must also specify prescheduled determinations of hourly energy returns.

by Qualified Northwest Resources. When section 4(c)(2)(D) of this policy is implemented to reduce the Exhibit B maximum of any Scheduling Utility, the reduction will be added to the capacity made available under this provision. Any utility with an Exhibit B amount must exhaust such capacity before requesting Assured Delivery under this provision.

(d) *Mitigation*

(1) *Operational Mitigation*

(A) *Southbound deliveries.* During any hour in which BPA has invoked Condition 1 or Condition 2 allocation procedures to preschedule energy deliveries, each utility's Assured Delivery amount shall be deducted from its formula allocation to determine its share of energy scheduled on the Intertie. If the remainder is negative for a given utility, then that utility must make up the difference by purchasing sufficient energy as follows:

(i) during Condition 1 from BPA or any Scheduling Utility with a Formula Allocation during that hour;

(ii) during Condition 2 from BPA, however, if BPA is not in the market the utility may purchase sufficient energy from any other utility.

(B) *Northbound returns.* During any hour in which BPA has invoked Condition 1 or Condition 2 allocation procedures, a utility may utilize the cash-out provisions of an Exchange contract only by reducing one-for-one the amount of North-to-South Intertie capacity otherwise available to it under this policy. The rate of cash out during any condition shall not exceed the rate at which the exchange return could have been scheduled.

(ii) *Cash out.* During any hour in which BPA has invoked Condition 1 or Condition 2 allocation procedures to preschedule energy deliveries, a utility may not utilize the cash-out provisions of a Seasonal Exchange contract. The rate of a cash out during Condition 3 shall not exceed than the rate at which the exchange return could have been scheduled.

(5) *Satisfying Requests For Assured Delivery.* To allow sufficient time for contract negotiation, initial requests under this policy will be accepted until February 1, 1989. Thereafter, BPA will negotiate and execute Assured Delivery contracts. If Intertie Capacity remains available for Assured Delivery of transactions limited by Exhibit B amounts, subsequent requests must be received no later than 120 days before commencement of the next BPA operating year. All relevant power contracts must be presented for review no later than the date on which a request for Assured Delivery is made. BPA will not entertain Assured Delivery requests for firm power sales in excess of a utility's Exhibit B maximum.

Section 5. *Formula Allocation*

(a) *Limits On Intertie Capacity Available For Formula Allocation.* Generally, BPA will determine Intertie Capacity available for Formula Allocations after first taking into account the amount of Intertie Capacity necessary to satisfy requirements of the Administrator's Power Marketing Program, existing transmission contracts listed in Exhibit C, and Assured Delivery contracts executed by BPA pursuant to this policy. However, during Condition 1, BPA will

(2) *Negotiated mitigation.* A Scheduling Utility may also elect to negotiate with BPA on a case-by-case basis a package of mitigation measures involving mutually agreeable consideration of value commensurate with the service provided.

Section 5. *Formula Allocation*

(a) *Limits On Intertie Capacity Available For Formula Allocation.* Generally, BPA will determine Intertie Capacity available for Formula Allocations after first taking into account the amount of Intertie Capacity necessary to satisfy requirements of the Administrator's Power Marketing Program, existing transmission contracts listed in Exhibit C, and Assured Delivery contracts executed by BPA pursuant to this policy. However, in determining Available In-

not consider the Assured Delivery contracts subject to mitigation requirements in determining available Intertie capacity. BPA may reduce any allocation, if additional Intertie Capacity is required to minimize revenue losses associated with actions taken to protect fish in the Columbia River drainage basin.

(b) *Northwest Scheduling Utility Requirements.* BPA will make utilities aware of scheduling requirements before the policy is implemented.

(c) *Allocation Methods.*

(1) *Condition 1*

(A) *Until December 31, 1988.* Intertie Capacity will be allocated pursuant to the Exportable Agreement (BPA Contract No. 14-03-73155), when applicable.

(B) *After December 31, 1988.* Condition 1 will be in effect when the Federal system is in spill or in likelihood of spill, as determined by BPA. Available Intertie capacity will be allocated pursuant to the following procedure:

(i) Each hour, the maximum Condition 1 allocations for BPA and each Scheduling Utility will be based on the ratio of their respective hydroelectric generating capacities to the Northwest's total hydroelectric generating capacity, multiplied by the available Intertie capacity (the "Hydro Cap"). To the extent that the declarations of some Scheduling Utilities are less than their respective Hydro Caps, BPA will allocate the remainder, pro rata, to itself and to other Scheduling Utilities whose declarations exceed their respective Hydro Caps.

tertie Capacity during Condition 1, BPA will not consider the Assured Delivery contracts to the extent they are subject to operational mitigation requirements. BPA may reduce any allocation, if additional Intertie Capacity is required to minimize revenue losses associated with actions taken to protect fish in the Columbia River drainage basin.

(b) *Protected Area Decrements.* Except as provided in section 4(d)(2)(A) of this policy, BPA will reduce each Scheduling Utility's allocation by any Protected Area decrement imposed pursuant to section 7(d).

(c) *Allocation Methods*

(1) *Condition 1*

(A) *Until December 31, 1988.* Intertie Capacity will be allocated pursuant to the Exportable Agreement (BPA Contract No. 14-03-73155), when applicable.

(B) *After December 31, 1988.* Condition 1 will be in effect when the Federal hydro system is in spill or there is a likelihood of spill, as determined by BPA. Available Intertie capacity will be allocated pursuant to the following procedure:

(i) Each hour, the maximum Condition 1 allocations for BPA and each Scheduling Utility will be based on the ratio of their respective declarations to total declarations, multiplied by the Available Intertie Capacity.

tions are greater than, or equal to, their respective Hydro Caps. Examples of allocations under Condition 1 are shown in Exhibit A.

(ii) During Condition 1, whenever the Southwest market at BPA's applicable rate is less than the available Intertie capacity, BPA will allocate no more capacity than that market amount.

(iii) In calculating each Scheduling Utility's Hydro Cap, BPA will reduce the hydroelectric generating capacities of individual utilities by any Protected Area decrements determined pursuant to section 7.

(2) *Condition 2*

When Condition 1 is not in effect, but BPA and Scheduling Utilities declare amounts of energy that exceed available Intertie capacity, Formula Allocations for BPA and each Scheduling Utility will approximate, by hour, the ratio of each declaration to the sum of all declarations, multiplied by the available Intertie capacity. An example of an allocation under Condition 2 is shown in Exhibit A.

(3) *Condition 3*

When Condition 1 is not in effect and when the total surplus energy declared available by BPA and Scheduling Utilities is less than the total available Intertie Capacity, BPA and Scheduling Utilities' allocations will equal their declarations. The remaining Intertie capacity will be made available

(ii) During Condition 1, whenever BPA is unable to utilize its full pro rata share of Intertie usage BPA will take larger allocations on ensuing days until the difference in pro rata Intertie usage is eliminated.

(2) *Condition 2*

(A) When Condition 1 is not in effect, but BPA and Scheduling Utilities declare amounts of energy that exceed available Intertie capacity, Formula Allocations for BPA and each Scheduling Utility will approximate, by hour, the ratio of each declaration to the sum of all declarations, multiplied by the available Intertie capacity.

(B) If BPA sales drop below 75 percent of its allocation during Condition 2, BPA may take larger allocations on ensuing days until the difference is eliminated.

(3) *Condition 3*

When Condition 1 is not in effect and when the total surplus energy declared available by BPA and Scheduling Utilities is less than the total available Intertie Capacity, BPA and Scheduling Utilities' allocations will equal their declarations. The remaining Intertie capacity will be made available

to Extraregional Utilities. Examples of the two possible allocation procedures under Condition 3 are shown in Appendix A.

(d) *Modified Allocations Upon Commercial Operation Of the Third A.C. Interconnection.* When the market power of California Intertie owners is reduced upon commercial operation of the third AC interconnection, BPA will cease allocating individual Intertie capacity amounts to non-Federal utilities during Conditions 2 and 3. Instead, after allocating sufficient capacity to itself, BPA will to the extent practicable make the remaining Intertie Capacity available as a block to Scheduling Utilities, and make any residual amount under Condition 3 available to Extraregional Utilities. However, this provision will not be operative if the Administrator determines that:

(1) even after commercial operation of the third AC, Intertie access continues to be impaired for California utilities presently lacking ownership in the southern portion of the Intertie, or

(2) Southwest utilities utilize some pro rata scheme to allocate energy purchases over the Intertie.

first to U.S. Extraregional Utilities and then to other Extraregional Utilities. Section 3(d) of this policy shall not apply to Scheduling Utilities during Condition 3.

(d) *Formula Allocation Experiment.* BPA is interest in exploring the proposal that it cease making individual Formula Allocations to Scheduling Utilities under Conditions 2 and 3. However, BPA must work with Northwest and Southwest utilities to develop the information capability to accommodate a new scheduling system for nonfederal access. As soon as this can be accomplished BPA will substitute the following provisions for section 5(c) on an 18-month experimental basis:

(1) *Condition 1*

Same as section 5(c)(1).

(2) *Condition 2*

(A) When Condition 1 is not in effect, but BPA and Scheduling Utilities declare amounts of energy that exceed available Intertie capacity, the Formula Allocation for BPA will approximate, by hour, the ratio of BPA's declaration to the sum of all declarations, multiplied by the Available Intertie Capacity. The remaining capacity will be made available as a block to Scheduling Utilities. Section 5(c)(2)(B) of this policy shall apply.

(3) *Condition 3*

When Condition 1 is not in effect and when the total surplus energy declared available by BPA and Scheduling Utilities is less than the total available Intertie Capacity, BPA's allocation will equal its declaration. The remaining Intertie capacity will be made available, first, as a block to satisfy the declarations of Scheduling Utilities, second, to U.S. Extraregional Utilities, and third to other Extraregional Utilities. Section 3(d) of this policy shall not apply during Condition 3.

(e) *Data Collection and Evaluation.* Commencing when this policy goes into effect and continuing during the course of the experiment described in section 5(d), BPA will collect information on the following topics relevant to future allocation procedures:

(1) effect on BPA revenue of allocating to nonfederal utilities as a group rather than individually.

(2) impairment of Intertie access for California utilities presently lacking ownership in the southern portion of the Intertie.

(3) any loss of sales to BPA due to a failure to share unused capacity among California entities with ownership or contractual interests in the Intertie.

(4) effects of the experiment on small Scheduling Utilities.

During the course of the experiment, interested parties may submit written comments and recommendations on these issues.

(f) *Findings and conclusions.* At least 30 days before the end of the experiment described in sec-

tion 5(d), BPA shall publish a report of its findings on the experiment and its decision on whether section 5(d), with possible modification, should be continued as the permanent method of Formula Allocation.

Section 6. *Access for Qualified Extraregional Resources*

(a) *Assured Delivery.* Any request for Assured Delivery of power from a Qualified Extraregional Resource would be granted only by contract which, in addition to the Mitigation measures specified in section 4(d)(4)(B), must include benefits to BPA such as increased storage, improved system coordination or operation, or other consideration of value commensurate with the services provided. However, Canadian Extraregional Utilities will not be provided Assured Delivery service until the Administrator has determined that the capability of the Intertie is rated at approximately 7,900 MW. Proposed contracts would be evaluated by BPA and reviewed publicly to determine whether it would cause substantial interference with the Administrator's Power Marketing Program. An environmental review would also be conducted.

(b) *Formula Allocation.* Under Condition 3, energy from Canadian Qualified Extraregional Resources will have access to the Intertie to the extent that Intertie Capacity is available in excess of the amount used by BPA, Scheduling Utilities, and energy from U.S. Qualified Extraregional Resources. BPA may provide qualified Extraregional Resources with some additional Formula Allocation, if the

Section 6. *Access for Qualified Extraregional Resources*

(a) *Assured Delivery.* Any request for Assured Delivery of power from a Qualified Extraregional Resource would be granted only by contract which, in addition to the Mitigation measures specified in section 4(d), must include benefits to BPA such as increased storage, improved system coordination or operation, or other consideration of value commensurate with the services provided. Proposed contracts would be evaluated by BPA and reviewed publicly to determine whether they would cause substantial interference with the Administrator's Power Marketing Program. An environmental review would also be conducted.

(b) *Formula Allocation.* Under Condition 3, energy from Qualified Extraregional Resources has access to the Intertie. In addition, BPA may provide Extraregional Utilities with Formula Allocation under other conditions, if the utility agrees by contract either to increased participation in the Pacific Northwest's coordinated planning and operation, or to provide other consideration of value, apart from

utility owner agrees by contract either to increased participation in the Pacific Northwest's coordinated planning and operation, or to provide other consideration of value, apart from the standard BPA wheeling rate, commensurate with the services provided.

Section 7. *Fish and Wildlife Protection*

(a) Purpose. Hydroelectric projects constructed in Protected Areas may substantially decrease the effectiveness of, or substantially increase the need for, expenditures and other actions by BPA, under Northwest Power Act section 4(h), to protect, mitigate or enhance fish and wildlife resources. Intertie access will not be provided to facilitate the transmission of power generated by any new hydroelectric projects located in Protected Areas, licensed after the effective date of this policy. Upon expiration of a Federal Power Act license for an existing project located within a Protected Area, BPA will assist the licensee in developing any necessary protective conditions so that the project may continue to qualify for Intertie Access.

(b) *Implementation.* This policy contemplates that BPA will implement, after review and possible modification, a comprehensive protected area program adopted by the Pacific Northwest Electric Power and Conservation Planning Council. In the meantime, BPA will adopt the Protected Area designations compiled by the Council staff. Exhibit D lists those stream

the standard BPA wheeling rate, commensurate with the services provided.

Section 7. *Fish and Wildlife Protection*

(a) *Purpose.* New hydroelectric projects constructed in Protected Areas may substantially decrease the effectiveness of, or substantially increase the need for, expenditures and other actions by BPA, under Northwest Power Act section 4(h), to protect, mitigate or enhance fish and wildlife resources. Intertie access will not be provided to facilitate the transmission of power generated by any new hydroelectric projects located in Protected Areas and licensed after the effective date of this policy. This provision does not apply to added capacity at existing projects.

(b) *Effect.* This section imposes automatic operational limitations on a utility by reducing the amount of energy that can be scheduled over the Intertie, thereby increasing costs or reducing revenues for any utility owning or acquiring the output of a Protected Area hydroelectric resource.

(c) *Implementation.* Protected Area designations for stream reaches in the Columbia River Basin are shown in Exhibit C to this policy. Exhibit C uses Environmental Protection Agency stream reach codes. Subject to review and possible modification, BPA will consider the adoption of comprehensive state watershed management plans and a comprehensive protected

reaches, using Environmental Protection Agency stream reach codes, currently designated by BPA as protected areas.

(c) *Enforcement.* If a Scheduling Utility or Nonscheduling Utility owns, or acquires the output from, a hydroelectric project covered under the restrictions of section 7(a), BPA will reduce that utility's Assured Delivery capacity and the Formula Allocation made available to it under the Condition 1 Hydro Cap by either the nameplate rating of the project (in the case of ownership), or the amount of capacity acquired.

area program developed by the Pacific Northwest Electric Power and Conservation Planning Council subsequent to implementation of this Policy. BPA will also consider revisions to Protected Area designations if the Council's Program is amended.

(d) *Enforcement.* If a Scheduling Utility or Nonscheduling Utility owns, or acquires the output from, a hydroelectric project covered under the restrictions of section 7(a), BPA will reduce that utility's Formula Allocation by either the nameplate rating of the project (in the case of ownership), or the amount of capacity acquired by contract.

(e) *Exceptions*

(1) *PURPA Projects.* BPA will entertain requests that it not enforce the provisions of section 7 in situations where an investor-owned utility has been compelled to acquire the output of a Protected Area hydroelectric resource under section 210 of the Public Utilities Regulatory Policies Act (PURPA). To qualify for this exception, the investor-owned utility must demonstrate:

(A) that it has exercised all opportunities available under federal and state laws and regulations to decline to acquire the output of the Protected Area resource in question;

(B) that it has petitioned its state regulatory authority(ies) to reduce the rate(s) established under PURPA for purchases from Protected Area resources in recognition of the increased costs or reduced revenues caused by operation of section 7(c) of this policy;

(C) that BPA was provided reasonable notice of all relevant regulatory and judicial proceedings to allow for timely intervention in such proceedings; and

(D) after taking all of the foregoing steps and exhausting all reasonable opportunities for judicial review, that it was compelled to acquire the output of a Protected Area hydroelectric resource by final order of FERC or a state regulatory authority issued under PURPA.

(2) *Projects Contributing to Council's Fish and Wildlife Program or BPA Investments.* Access will be automatically denied for projects developed in protected areas unless BPA receives sufficient demonstration that a particular project will provide benefits to existing or planned BPA fish and wildlife investments or the Council's Program. BPA's determination will be based on:

(A) information provided by the project developer, Federal and state fish and wildlife agencies, and tribes; or

(B) action by the Pacific Northwest Power Planning Council.

Section 8. *Other Enforcement Provisions*

Whenever the terms of this policy are not being met, BPA will inform the appropriate utility of the nature of the noncompliance and actions that may be taken to achieve compliance. If noncompliance is not corrected within a reasonable period, BPA may impose an appropriate sanction. Sanctions include denial of access for a resource and refusal to accept schedules.

Section 8. *Other Enforcement Provisions*

(a) Whenever the terms of this policy are not being met, BPA will inform the appropriate utility of the nature of the noncompliance and actions that may be taken to achieve compliance. If noncompliance is not corrected within a reasonable period, BPA may deny access for a resource and refuse to accept schedules.

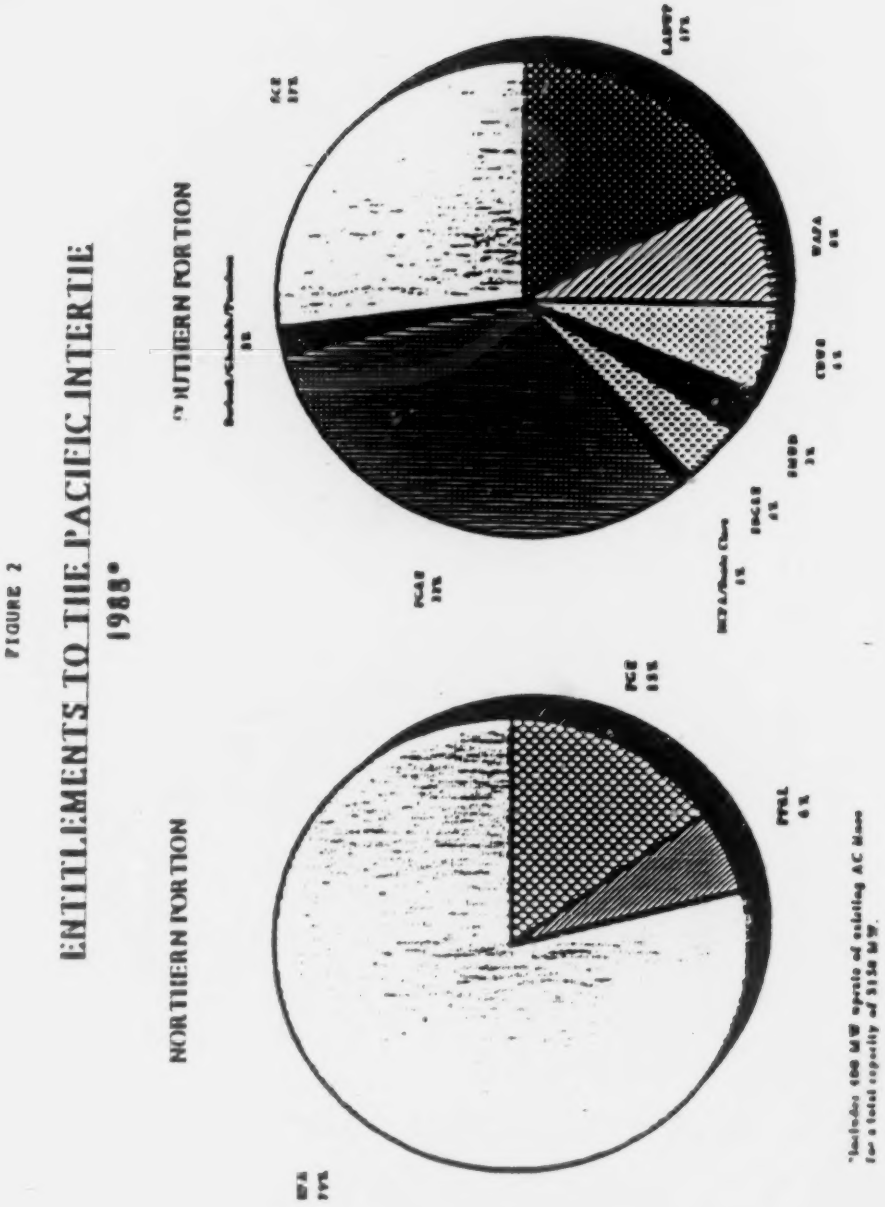
(b) Upon approval of the pro-

posed U.S.-Canada Free Trade Agreement by the Canadian Parliament and the United States Congress, any and all distinctions made in this policy between Canadian and United States Extra-regional Utilities shall terminate on the effective date of the Agreement.

APPENDIX F

FIGURE 2

ENTITLEMENTS TO THE PACIFIC INTERTIE
1988*

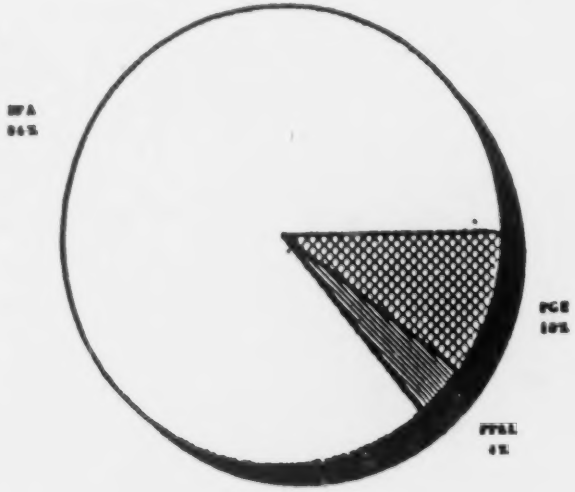


Intertie Access Policy of the Bonneville Power Administration: Oversight Hearing Before the Subcommittee on Water and Power Resources of the House Committee on Interior and Insular Affairs, 100th Cong., 1st Sess. 158-60 (1987) [BPA Record Item VI.A.28.].

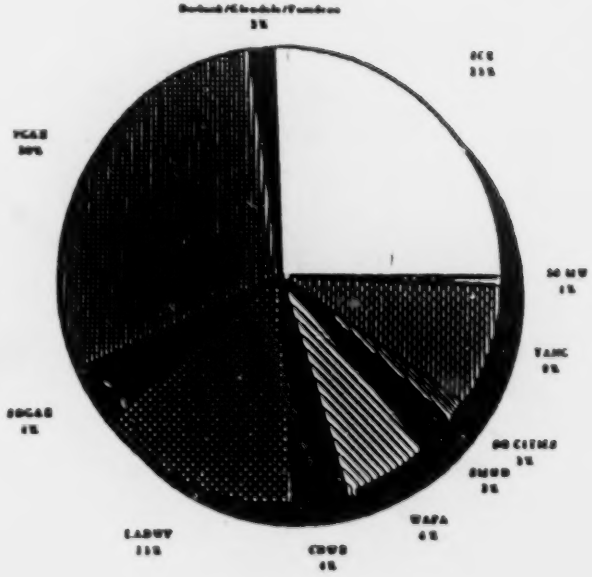
FIGURE 3

ENTITLEMENTS TO THE PACIFIC INTERTIE AFTER PLANNED INTERTIE EXPANSIONS*

NORTHERN PORTION



SOUTHERN PORTION



*Assumes total Intertie capacity of 3790 MW.

(3) (2)

Nos. 90-1256 and 90-1415

Supreme Court, U.S.
FILED
APR 8 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CALIFORNIA ENERGY COMMISSION, ET AL., PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

PUGET SOUND POWER & LIGHT COMPANY,
CROSS-PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, in reviewing the challenge to the Long Term Intertie Access Policy promulgated by the Bonneville Power Administration, properly deferred to the Administrator's construction of the governing statutory scheme under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.*, the Federal Columbia River Transmission System Act, 16 U.S.C. 838 *et seq.*, the Pacific Northwest Consumer Power Preference Act of 1964, 16 U.S.C. 837 *et seq.*, and the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*

2. Whether the court of appeals correctly upheld the Administrator's allocation of access to the Pacific Northwest-Pacific Southwest Intertie, which preferred utilities in the Pacific Northwest over Canadian and other extra-regional utilities.

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In the Supreme Court of the United States

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No. 90-1256

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ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 909 F.2d 1298.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. A petition for rehearing was denied on October 5, 1990. Pet. App. D1-D4. On December 21, 1990, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 4, 1991. The petition was filed on that date. The cross-petition for

a writ of certiorari was filed on March 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners and cross-petitioner, various California utility regulatory bodies, several California utilities, and one Washington utility, have challenged the validity of the Long Term Intertie Access Policy promulgated by the Bonneville Power Administration to allocate electric transmission capacity in the Pacific Intertie among various utilities connected to that high voltage energy transmission system.

1. Respondent Bonneville Power Administration (BPA) is an independent, self-financed agency within the United States Department of Energy. BPA markets electric energy generated largely from dams in the Federal Columbia River Power System. As part of that task, BPA operates a large transmission system, including the federal share of the Pacific Intertie, a high voltage electrical energy transmission system connecting BPA and utilities in the Pacific Northwest with utilities in California.[1] Congress approved construction of the Intertie in order to create a market for surplus federal electric power and thereby help BPA repay the federal investment in Northwest hydroelectric facilities. BPA currently owes approximately $8 billion to the United States Treasury. Pet. App. E57.

The Intertie's capacity is finite. As a result, shortly after the Intertie was completed in 1968, BPA and utilities in the Pacific Northwest entered into an agreement regarding short-term allocation of BPA's Intertie capacity—the

[1] BPA controls a majority of the Intertie north of the Oregon-California border. California utilities, including petitioners Pacific Gas & Electric Company and Southern California Edison Company, own and control the southern portion of the Intertie. Pet. App. E58.

Exportable Agreement of 1969. The Agreement was based on the following fundamental characteristic of the power generation system. The ability of a hydroelectric dam to store energy in the form of water is limited to the capacity of the reservoirs behind the dams. When river flows are high, reservoirs full, and markets not available, "spill"—the flow of excess water past turbines without the generation of energy—takes place and results in the loss of the electrical generation capacity of the spilled water. The Agreement therefore allocated federal Intertie capacity on a pro rata basis among BPA and Pacific Northwest generating utilities for surplus energy that might otherwise be wasted because of the need to spill.[2] When a spill was threatened, the Agreement reserved federal Intertie capacity for the use of BPA and Pacific Northwest generators. At these times, the Agreement excluded extra-regional utilities, including Canadian sources, from access to the Intertie. Pet. App. C6.

2. In the early 1980s, an unexpected increase in the availability of surplus power in the Pacific Northwest and elsewhere, together with a significant downturn in BPA's finances, prompted BPA to reexamine the allocation of Intertie capacity. Pet. App. E3-E4. As a result, BPA initiated the extensive administrative process that ultimately led to the final Long Term Intertie Access Policy (LTIAP) at issue here.

In 1984, after public hearings and opportunity for comment, BPA promulgated the Interim Near Term Access Policy. That policy included a formula allocation provision

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[2] Section 1(b) of the Pacific Northwest Consumer Power Preference Act of 1964 (Preference Act), 16 U.S.C. 837(b), defines the Pacific Northwest to include Oregon, Washington, and portions of Montana, Nevada, Utah, Wyoming, and Idaho. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839a(14)(A), later included the entire State of Idaho.

governing short-term surplus sales. Pet. App. C9-C10. In relevant part, that provision incorporated the pro rata allocation of the Exportable Agreement in times of spill. *Id.* at C10 (Condition 1). Where spill was not threatened, but where BPA and Northwest utilities had hourly surplus power exceeding available federal Intertie capacity, that capacity was allocated according to a ratio that approximated each party's surplus to the sum of all declared surplus *Id.* at C11-C12 (Condition 2). Where spill was not threatened and where declared surplus in the region did not exceed the available capacity of the federal Intertie, each Northwest party was permitted access to the Intertie to the full extent of its surplus, and any remaining capacity was made available for Canadian and other extra-regional utilities. *Id.* at C10-C11 (Condition 3).

Petitioner Department of Water and Power of the City of Los Angeles challenged BPA's Interim Near Term Access Policy, including its provisions excluding Canadian power other than in Condition 3. In *Department of Water & Power* v. *Bonneville Power Admin.* (*LADWP*), 759 F.2d 684 (9th Cir. 1985) (Pet. App. C1-C24), the court of appeals rejected that challenge, concluding that BPA may properly allocate its Intertie capacity on a pro rata basis and that BPA may prefer itself and Pacific Northwest utilities over Canadian and other extra-regional utilities. As the court explained, "Congress intended that the Intertie be used primarily for the benefit of Northwest and Southwest utilities and not for the benefit of Canadian utilities." Pet. App. C22.

3. Following the development of the Interim Policy, BPA continued with its extensive administrative process and promulgated the Near Term Intertie Access Policy in 1985. In relevant part, the Near Term Policy carried forward the allocation scheme under the three Conditions established by the Interim Near Term Policy. Pet. App. B5-B6. Peti-

tioners California Energy Commission (CEC) and California Public Utilities Commission (CPUC) promptly challenged the Near Term Policy. Petitioners contended that BPA exceeded its authority by allocating Intertie access on a pro rata basis and that, under 16 U.S.C. 837e and 838d, BPA could not limit access by Canadian and extra-regional utilities.

On the basis of its earlier *LADWP* decision, the court of appeals rejected petitioners' challenge, holding that BPA's allocation scheme and preference for Northwest utilities were lawful. *California Energy Resources Conservation & Dev. Comm'n* v. *Bonneville Power Admin.* (*CEC I*), 831 F.2d 1467 (9th Cir. 1987) (Pet. App. B1-B25), cert. denied, 488 U.S. 818 (1988).

4. In May 1988, after further administrative proceedings, BPA adopted the final Long Term Intertie Access Policy (LTIAP). In relevant part, BPA adhered to the basic short-term allocation scheme contained in the prior policies. Under Condition 1, which obtains during periods of threatened spill, the Intertie's available capacity is allocated on an hourly pro rata basis among BPA and those Northwest utilities declaring surplus power. Pet. App. E6-E10. Under Condition 2, which obtains during periods when the declared supply of surplus energy in the Northwest exceeds Intertie capacity, the Intertie's capacity is allocated on that same pro rata basis. *Id.* at E11. Under Condition 3, which obtains "when the declarations of BPA and Northwest utilities are less than Intertie capacity," *ibid.*, access by BPA and the Northwest utilities for their declared surplus amounts is unrestricted, with Canadian utilities and others permitted access to any remaining capacity, *id.* at E11-E12.

Petitioners, including cross-petitioner (collectively petitioners), and others had complained to BPA that the hourly allocation scheme under the proposed LTIAP unnecessarily limited competition. As a result, BPA's final

LTIAP suspended the operation of the Conditions 2 and 3 allocations in favor of an 18-month experiment where no individual nonfederal allocations would be made after BPA received its allocation. Instead, under Condition 2, all short-term capacity not used by BPA would be made available to the Northwest utilities as a block, to be allocated on a first-come, first-served basis to those utilities arranging transactions with California utilities. This allocation for Northwest utilities would also obtain under Condition 3; any remaining capacity would be made available to Canadian and other extra-regional utilities. As it turned out, water levels allowed the experiment to proceed on only 20 days out of the originally planned 18-month period. BPA has thus extended the experiment until September 1991, in order to gather more data. See 55 Fed. Reg. 13,824 (1990).

In the meantime, petitioners and others challenged the LTIAP before the court of appeals under 16 U.S.C. 839f(e)(5). They contended, among other claims, that BPA's construction of the governing statutory scheme should not be accorded substantial deference "because it has an economic interest in obtaining a larger share of the economic benefits of the interregional transactions." Pet. App. A13. On the merits, petitioners argued that the LTIAP unlawfully discriminates against Canadian power, contrary to the provisions of the Federal Columbia River Transmission System Act (Transmission Act) and the Preference Act. See 16 U.S.C. 837e, 838d.

5. In July 1990, the court of appeals "conclude[d] that BPA's actions and decisions in developing the LTIAP were not arbitrary and capricious and [therefore] affirm[ed] the LTIAP in its entirety." Pet. App. A36. Following *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984), the court of appeals concluded that "[b]ecause BPA drafted the Northwest

Power Act, its interpretation of the Act is to be given 'great weight' and should be upheld if reasonable." Pet. App. A12. The court disagreed with petitioners' suggestion that BPA should not receive such deference "because it has an economic interest" in the subject matter under review. *Id.* at A13. As the court explained, "BPA did not draft the LTIAP to maximize its revenues," and it had previously "rejected the argument that BPA is entitled to no deference in ratemaking decisions, even where it has an interest in the outcome." *Ibid.* (citing *Aluminum Co. of America* v. *Bonneville Power Admin.*, 891 F.2d 748, 757 n.12 (9th Cir. 1989)). Turning to petitioners' substantive attack on the LTIAP, the court pointed out that it had previously reviewed and rejected that contention in *LADWP*, 759 F.2d at 693-694 (Pet. App. C20-C22). The court therefore reaffirmed that ruling. Pet. App. A25-A26 & n.14.

ARGUMENT

1. Petitioners contend that the court of appeals erred in deferring to BPA's construction of the governing statutory scheme, where the agency has a "direct and immediate financial interest in [its] own decision[]." Pet. 13; Cross-Pet. 11-12. As an initial matter, petitioners overstate the circumstances under which BPA operates. First, as the court of appeals expressly found, "BPA did not draft the LTIAP to maximize its revenues." Pet. App. A13. Second, petitioners' branding of BPA as "proprietary" (Pet. 13) is a mischaracterization. Although BPA is self-financed and not funded by tax revenues, it is not a profit-making firm. Rather, Congress expressly charged the agency with maintaining "the lowest possible rates to consumers consistent with sound business principles," 16 U.S.C. 838g, while at the same time directing it to recover costs and make timely

repayment of the $8 billion federal investment in the Columbia River Power System.[3]

In any event, this Court's decision in *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984) (*ALCOA*), forecloses petitioners' contention. There, BPA specifically informed the Court of its substantial financial stake in the statutory question at issue. See Brief for Federal Respondent at 19, *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, No. 82-1071. Nonetheless, this Court held that "[u]nder established administrative law principles, it is clear that the Administrator's interpretation of the [Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.*,] is to be given great weight." *ALCOA*, 467 U.S. at 389.

Petitioners' claim (Pet. 13-14; Cross-Pet. 11) that the court of appeals' decision conflicts with *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563 (D.C. Cir. 1987), is insubstantial. The isolated statement petitioners seize upon—that "deference would be inappropriate * * * if the agency itself were an interested party to the [settlement] agreement," *id.* at 1571—has no application here. BPA is not construing an agreement between private parties; BPA is construing its own governing statutory scheme. Indeed, the statement petitioners trumpet had no application to the case before the D.C. Circuit. There, the court of appeals reviewed FERC's construction of a settlement agreement to which the agency was not a party. In those circumstances, given the agency's acknowledged expertise and the fact that

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[3] Petitioners thus mistakenly suggest (Pet. 15) that BPA operates as a traditional business, as do other independent government corporations, such as the Federal Home Loan Mortgage Corporation, see 12 U.S.C. 1452-1455, and the Student Loan Marketing Association, see 20 U.S.C. 1087-2.

"Congress required the Commission to take an active role in approving [settlement] agreement[s]," *ibid.*, the D.C. Circuit did not hesitate to defer to FERC's reading of the agreement at issue, *id.* at 1568-1572. That is precisely what the court of appeals did here.

Petitioners' suggestion (Pet. 14-15; Cross-Pet. 11-12) that the courts of appeals are divided over whether an agency is entitled to deference when construing the scope of its own jurisdiction is similarly unpersuasive. This Court has consistently deferred to agencies' determinations regarding their statutory jurisdiction. See, *e.g.*, *Massachusetts* v. *Morash*, 490 U.S. 107, 114-118 (1989); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 114-116 (1988); *NLRB* v. *Food & Commercial Workers Local 23*, 484 U.S. 112, 123-128 (1987); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986); *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125-126 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Indeed, as Justice Scalia recently stated, "it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (concurring in the judgment); see *Dole* v. *United Steelworkers*, 110 S. Ct. 929, 944 (1990) (White, J., dissenting). For that reason, the lower courts have had little difficulty applying that principle of administrative law. See, *e.g.*, *Puerto Rico Maritime Shipping Auth.* v. *Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988); *Wyckoff Co.* v. *EPA*, 796 F.2d 1197, 1200-1201 (9th Cir. 1986).

Finally, petitioners' assertion (Pet. 14) that decisions of the D.C. and Eighth Circuits conflict with this approach

lacks foundation. In *Ohio Power Co.* v. *FERC*, 880 F.2d 1400 (D.C. Cir. 1989), rev'd on other grounds *sub nom. Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990), the court of appeals declined to defer to the agency's interpretation *not* because the statute at issue involved the agency's jurisdiction, but rather because the agency itself claimed no such deference since that statute "cannot be said to be entrusted to FERC's administration." 880 F.2d at 1405.[4] And in *Missouri* v. *Andrews*, 787 F.2d 270 (8th Cir. 1986), aff'd on other grounds *sub nom. ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988), the court of appeals refused to defer to the Secretary of the Interior's construction of Section 9(c) of the Flood Control Act because the court of appeals' "review of the Act and its legislative history convince[d] [the court] that Congress did not intend to grant the Secretary * * * the authority [at issue]." 787 F.2d at 287. That decision, contrary to petitioners' suggestion, is merely a straightforward application of the *Chevron* framework.

2. Turning to the merits of the underlying controversy, petitioners contend (Pet. 16-21) that the court of appeals erred in upholding the Administrator's allocation of access to the Pacific Northwest Pacific-Southwest Intertie, which preferred utilities in the Pacific Northwest over Canadian and other extra-regional utilities. In petitioners' view, Section 6 of the Preference Act, 16 U.S.C. 837e, and Section 6 of the Transmission Act, 16 U.S.C. 838d,[5] mandate

[4] Similar reasoning accounts for the court of appeals' declining to defer to the agency's construction of the statute at issue in *New York Shipping Ass'n* v. *Federal Maritime Comm'n*, 854 F.2d 1338, 1362 (D.C. Cir. 1988) ("We note with interest that this is not a case in which the Commission lays claim to any deference for its interpretation.").

[5] Section 6 of the Pacific Northwest Consumer Power Preference Act of 1964, 16 U.S.C. 837e, provides in pertinent part:

> Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the

that BPA give Canadian and other extra-regional utilities the same Intertie access as nonfederal Pacific Northwest utilities to arrange transactions with California utilities.[6]

a. Congress enacted the Preference Act in 1964 as part of the legislative package authorizing construction of the Intertie. See Pub. L. No. 88-257, 77 Stat. 844 (1963); Pub. L. No. 88-511, 78 Stat. 682 (1964). On its face, Section 6 of the Preference Act requires BPA to make excess capacity "available as a carrier." 16 U.S.C. 837e. Under the LTIAP, BPA makes available excess Intertie capacity as a

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Pacific Northwest or Canada with the other area or with any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy or the energy described in section 837h of this title, shall be made available as a carrier for transmission of other electric energy between such areas.

Section 6 of the Federal Columbia River Transmission System Act, 16 U.S.C. 838d, provides:

> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

[6] Cross-petitioner Puget Sound Power & Light Company challenges (Cross-Pet. i) BPA's allocation of "Assured Delivery" amounts among Pacific Northwest utilities. That challenge is groundless. Under the Assured Delivery provisions of the LTIAP, each utility granted an Assured Delivery allocation is guaranteed access to the Intertie in the amount allocated in order to permit firm power sales. Unallocated Assured Delivery capacity remains available for seasonal exchanges of power. BPA did not grant cross-petitioner an Assured Delivery allocation because that utility did not have any average firm surplus power that could be used for firm sales. See Pet. App. E169-E170. Nonetheless, BPA agreed to review cross-petitioner's complaint upon completion of the planned third Intertie. *Id.* at E71. In the meantime, cross-petitioner,

carrier for transmission of energy for the Northwest utilities and others. That is all that the statute requires. Contrary to petitioners' submission, the plain terms of 16 U.S.C. 837e do not circumscribe the Administrator's discretion in allocating excess Intertie capacity and do not require BPA to transmit Canadian power on the same terms as Northwest power.

Even if resort to the legislative record were appropriate, that record fully supports the decision below. The House Report states that the Administrator "may" enter into agreements for the wheeling of energy generated in Canada. H.R. Rep. 590, 88th Cong., 1st Sess. 9 (1963); see also S. Rep. No. 122, 88th Cong., 1st Sess. 12 (1963). Although petitioners point out (Pet. 18) that the House Report states that non-Treaty Canadian power "stands on the same basis as any other non-Federal energy," H.R. Rep. 590, *supra*, at 9, the very next sentence makes plain that this statement merely distinguishes non-Treaty Canadian power from the priority access granted to Canadian Treaty power by statute. See 16 U.S.C. 837h.[7] In context, therefore, the Report does

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along with other utilities, may seek to obtain Assured Delivery for seasonal exchanges. *Id.* at E162-E171.

Cross-petitioner also challenges in passing (Cross Pet. 5-7) the Condition 1 "true-up" mechanism that retains any unused BPA allocations for later BPA use. Because the unsold federal energy represented by the unused allocations is likely being retained behind the federal dams, the need for that Intertie capacity continues through time. Failure to incorporate such a mechanism could increase the amount of spill on the federal hydroelectric system. Pet. App. E88-E89. The true-up mechanism therefore properly ensures that federal needs have priority use of the Intertie.

[7] So-called "Canadian Treaty power" refers to Canada's share of power generated at hydroelectric facilities in the Pacific Northwest as

not suggest that Canadian power must be given the same access as that afforded to Pacific Northwest utilities.[8]

BPA's contemporaneous construction of the statute further suggests that Congress had no intention of treating non-Treaty Canadian power on the same basis as Northwest power. The Department of the Interior (BPA's parent agency at that time) reported to Congress that "BPA has assured the public and private utilities *of its service area* access over [BPA's] lines to California, Nevada, and Arizona markets." U.S. Dep't of the Interior, *Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest* 27 (Comm. Print 1964) (emphasis added). And in recommending enactment of the Preference Act, the Conference Committee expressly endorsed that report. H.R. Conf. Rep. No. 1822, 88th Cong., 2d Sess. 3-4 (1964). Moreover, BPA's first implementations of the legislation—the Exportable Agreement and other Intertie agreements—were each limited to Northwest and Southwest utilities and did not include any Canadian utility. And the Secretary of the Interior transmitted these agreements—including the provisions regarding pro rata allocations—to Congress.

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a result of the increased water flows from the Canadian reservoirs built in conjunction with the Treaty. Canada is entitled to one half of this generation. See Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, United States-Canada, 15 U.S.T. 1555, T.I.A.S. No. 5638. BPA must provide priority intertie access for Canadian Treaty power sold to California utilities. No such transactions currently exist, however. See *LADWP*, 759 F.2d at 694 n.15.

[8] Indeed, throughout the legislative record, descriptions of the benefits accruing from an intertie system focused on benefits flowing to the Pacific Northwest and the Pacific Southwest. See H.R. Conf.

b. Petitioners fare no better in invoking the "plain language" (Pet. 16) of Section 6 of the Transmission Act, 16 U.S.C. 838d. As the prefatory provision of the Act makes clear, Congress enacted the statute "in order to enable the Secretary of the Interior to carry out the policies of [the Preference Act] relating to the marketing of electric power from hydroelectric projects *in the Pacific Northwest*." 16 U.S.C. 838(a) (emphasis added). In other words, Congress identified Pacific Northwest power as the intended beneficiary of the Act. Indeed, petitioners' construction would create serious anomalies in the statutory scheme. For example, Congress has imposed several limitations to insure that the benefits of Northwest power are made available primarily to the Pacific Northwest area. See, *e.g.*, 16 U.S.C. 837b(a) (BPA must stop sales of surplus energy to California if Northwest needs the power); 16 U.S.C. 837b(d) (nonfederal Northwest utilities making firm sales to California have limited ability to rely on BPA's firm sales). Under petitioners' "equal access" theory, Canadian power would not be subject to these limitations and, as a result, would presumably have a competitive advantage.

The legislative record confirms that Congress enacted Section 838d in order to clarify BPA's obligation to treat public and private utilities alike in granting access to its transmission system. See H.R. Rep. No. 1375, 93d Cong., 2d Sess. 5 (1974); see also S. Rep. No. 1030, 93d Cong., 2d Sess. 9 (1974) (BPA's obligation is limited to transmitting power "in and from the Pacific Northwest."). The statutory provision thus stands in contrast to BPA's obligation – as a

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Rep. No. 1822, 88th Cong., 2d Sess. 7 (reprinting letter from Secretary of Interior); H.R. Rep. No. 590, *supra*, at 2; U.S. Dep't of the Interior, *Report to the Appropriations Committees of the Congress of the United States Recommending a Plan of Construction and Ownership of EHV Electric Interties Between the Pacific Northwest and Pacific Southwest* 32 (Comm. Print 1964).

seller of Federal power—"at all times * * * [to] give preference and priority to public bodies and cooperatives." 16 U.S.C. 832c(a). Congress inserted the Transmission Act's "fair and nondiscriminatory" language to preclude preference utilities from asserting that they had priority over investor-owned utilities to BPA's transmission services. See H.R. Rep. No. 1375, *supra*, at 5.[9]

3. Finally, petitioners' complaint (Pet. 21-23) that the LTIAP transfers substantial wealth from California utilities to the Pacific Northwest is premature. BPA adopted the policy based on its considered judgment that the LTIAP could be expected to divide the benefits of the Intertie in roughly equal proportions between the two regions. Pet. App. E247. Nonetheless, in response to comments by petitioners and others, BPA incorporated an experiment in the LTIAP to test the impact of more open competition among nonfederal Northwest utilities in Condition 2 and among all utilities in Condition 3. See Pet. App. E10-E12, E37-E38.

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[9] Moreover, despite oversight hearings on BPA's pertinent Intertie access policies, Congress has not expressed opposition to them. See *Oversight Hearings on Intertie Access Policy of the Bonneville Power Administration Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 100th Cong., 1st Sess. (1987); *Oversight Hearing on Potential Impacts of the Proposed U.S.-Canada Free Trade Agreement on California and Pacific Northwest Power Resources Before the Subcomm. on Water and Power of the House Comm. on Interior and Insular Affairs*, 100th Cong., 2d Sess. (1988). Congress's failure to revise or repeal those policies construing the governing statutory scheme "is persuasive evidence that the interpretation is one intended by Congress." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)).

BPA has since extended this experiment to October 1, 1991, in order to gather more data. See 55 Fed. Reg. 13,824 (1990). In these circumstances, petitioners' complaint here seeks to sidestep BPA's ongoing efforts to minimize any unnecessary economic upheaval.[10]

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioners gloss over the fact that, in addition to the rights provided to Canadian power in Condition 3, the LTIAP provides opportunities for transmission of firm Canadian power to California utilities. Pet. App. E38-E39, E196-E197.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CALIFORNIA ENERGY COMMISSION;
CALIFORNIA PUBLIC UTILITIES COMMISSION;
DEPARTMENT OF WATER AND POWER OF THE
CITY OF LOS ANGELES;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF BURBANK;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF GLENDALE;
WATER & POWER DEPARTMENT OF THE CITY OF PASADENA;
PACIFIC GAS AND ELECTRIC COMPANY;
SOUTHERN CALIFORNIA EDISON COMPANY;
and SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION,
JAMES J. JURA, as Administrator;
JAMES WATKINS, as Secretary of the
Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

Notwithstanding the Government's efforts to cloud the matter with irrelevant detail, the principal issue in this case is remarkably simple—*viz.*, whether the Bonneville Power Administration ("BPA") has authority to allocate transmission capacity on the Pacific Intertie in a manner that the Government concedes "prefer[s] . . . Pacific Northwest utilities over Canadian and other extra-regional utilities" (Opp. 4). To answer this question, the Court need look no further than Congress's express command that Intertie capacity not needed by BPA must be "ma[d]e available to *all* utilities on a fair and non-discriminatory basis . . . ." 16 U.S.C. § 838d. This issue, moreover, has unusual practical importance. *If* the BPA has misconstrued its statutory authority (as the petition for certiorari demonstrates it has), it has thereby created an unjustified interregional transfer of wealth in the billions of dollars at the expense of Southwest consumers. See Pet. 3-4, 7, 21-23. And it has done so, not on the basis of any authority expressly granted to it by Congress in the statute, but rather on the basis of tenuous inferences from snippets of legislative history.

The Government's brief disputes none of these points. Instead, the Government (1) quibbles with petitioners over the direction, timing, and exact amount of the interregional transfer that has occurred and will continue (Opp. 15-16); (2) attempts to justify the BPA's policy on the basis of another statutory provision that was not relied upon by the BPA or the Ninth Circuit (Opp. 14); (3) invokes additional bits of legislative history which it claims support the BPA's policy (Opp. 11-15); and (4) argues that the preliminary issue concerning the amount of deference owed to the BPA's interpretation is not worthy of this Court's attention (Opp. 7-10). Each of these arguments merits a brief response.

1. As explained in the petition (at 21-23), one of the most important reasons for reviewing the Ninth Cir-

cuit's decision is the tremendous "economic interests at stake." *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 619 (1991). The Government initially tries to minimize the importance of these interests by suggesting that the real conflict is not between the interests of Northwest utilities and Southwest consumers, but rather between the interests of Northwest and Canadian utilities. See, *e.g.*, Opp. 3, 4, 11, 12-13 & n.8, 14.[1] Putting aside the unseemliness of BPA's argument, BPA is simply wrong, for two reasons.

First, the economic harm done to California consumers by the Intertie Policy results in substantial measure from BPA's decision to "paternalistically restrict[] price competition among Northwest utilities . . . ." *LADWP*, App. B24 (Norris, J., dissenting). Second, because California consumers purchase substantial quantities of electricity from Canadian utilities, and because, absent the Intertie Policy, competition between Canadian utilities and Northwest utilities would tend to keep the prices charged by Northwest utilities within reasonable bounds, the Policy's discriminatory treatment of Canadian utilities has a direct and powerful impact on California consumers. That is why, as Judge Norris pointed out in dissent earlier, "[t]he exclusion of Canadian power . . . discriminates against Southwest energy purchasers . . . ." App. B24 n.1 (Norris, J., dissenting) (emphasis added). Indeed, petitioners' estimate of the economic harm inflicted upon California consumers by the Intertie Policy (Pet. 21-23) is *in addition to* the obvious economic harm it inflicts upon Canadian utilities.

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[1] BPA also suggests, incorrectly, that the economic dispute in this case is between Northwest utilities and California utilities. Opp. 15. Higher prices paid by California utilities to Northwest utilities are passed on to California consumers. That is why the California Energy Commission and the California Public Utilities Commission—each charged by statute with protecting the interests of consumers—have consistently challenged the BPA's Intertie Policy, and that is why they are petitioners before this Court.

BPA's contention that its "experiment" with "more open competition" renders petitioners' complaints "premature" (Opp. 15) is equally groundless. First, the experimental rule applies only in limited circumstances. It is not even operative during Condition 1—the period when demand for the Intertie is greatest and when most surplus Northwest energy is sold. Indeed, as the Government observes elsewhere in its brief, the rule operated "on only 20 days out of the originally planned 18-month period." Opp. 6.

Second, even during days when the experimental rule takes effect, it has limited impact on prices charged by Northwest utilities because it still excludes competition from Canadian utilities as well as from BPA, which is the dominant seller of power in the Northwest. By themselves, these artifical limitations on competition impose enormous costs on Southwest consumers, in addition to the costs imposed by BPA's artificial limitations on competition *among* non-federal Northwest utilities. See *supra* p. 2. Thus, even if the BPA's experimental rule were implemented on a permanent basis (and there is no suggestion from BPA that it will be), most of the economic harm to Southwest consumers would continue.

2. Aside from the Government's misleading effort to downplay the economic significance of this case, what is perhaps most striking about the Government's brief is its lame analysis of the pertinent statutory language. For example, the Government nowhere quotes the dispositive provision of Section 6 of the Transmission Act, which provides in full:

> The Administrator shall make available to *all* utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

16 U.S.C. § 838d (emphasis added). The statute could hardly be more clear in imposing upon the BPA a re-

sponsibility to allocate any "excess" transmission capacity—*i.e.*, that which is not needed to "transmit electric power generated or acquired by the United States"—to *all* utilities on a nondiscriminatory basis.

Section 6 of the Transmission Act therefore stands in stark contrast to Section 2 of the Preference Act, which clearly gives Northwest utilities priority in the *sale* of federal power. See 16 U.S.C. §§ 837 et seq. As a practical matter, what the BPA is attempting to do here is to bootstrap this statutory preference for Northwest utilities in the *sale* of federal power into a statutory preference for *transmission* capacity. But Congress has authorized only the former, and has expressly rejected the latter in Section 6 of the Transmission Act.

In a belated effort to give the BPA's interpretation some textual plausibility, the Government now points to a single statutory provision—the preface to the Transmission Act—which was never relied upon by the BPA or the Ninth Circuit.[2] That provision expresses Congress's purpose of "enabl[ing] the Secretary of Energy to carry out the policies of [the Preference Act] relating to the marketing of electric power from hydroelectric projects in the Pacific Northwest . . . ." 16 U.S.C. 838(a). The Government seeks to justify the BPA's admitted preference in favor of Northwest *utilities* on the ground that "Congress identified Pacific Northwest *power* as the intended beneficiary of the Act." Opp. 14 (emphasis added). On its face, the statutory language says nothing about Northwest utilities; it merely identifies the category of electric power to which the Act applies. Moreover, the provision refers only to *federal* power produced in the Northwest, whereas the Preference Act (to which the provision refers) allocates only

[2] Indeed, neither the BPA nor the Ninth Circuit ever cited *any* textual support for its interpretation of Section 6 of the Transmission Act.

federal power, not private power produced in the Northwest. See 16 U.S.C. §§ 837a, 837(c), (d).[3]

In short, the Government's implausible reading of the Transmission Act serves only to underscore the BPA's disregard for its governing statutes, and the corresponding need for review by this Court.

3. In their petition (at 20-21), the petitioners also pointed out a further, related reason why review by this Court is warranted: The heavy reliance upon legislative history by both the BPA and the Ninth Circuit flouts this Court's consistent teaching that, "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Neither the Ninth Circuit nor the BPA has been able to cite any legislative history that rises to a "clearly expressed legislative intention" to limit the Transmission Act's categorical nondiscrimination requirement to Northwest utilities. Viewed in the most favorable light, what the BPA and the Ninth Circuit have done is simply "narrow the plain meaning of [the] statute on the basis of a gestalt judgment as to what Congress probably intended." *Garcia* v. *United*

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[3] The Government similarly fails in its effort to prove that reading "all utilities" in Section 6 of the Transmission Act to mean "all utilities" instead of "all *Northwest* utilities" would create "anomalies in the statutory scheme." Opp. 14. The Government argues that because the Preference Act restricts the sale of federal power outside the Northwest when it is needed in the Northwest, a literal reading of Section 6 of the Transmission Act would "presumably" give Canadian power a "competitive advantage." *Id.* This argument makes no sense. At times when BPA is precluded by the statute from selling its power to California, it is not, by definition, a participant in the extraregional power market. Accordingly, use of the Intertie to transmit Canadian power could have no competitive effect whatsoever on BPA. And providing Canadian power "equal access" to the Intertie at other times obviously does not give it a competitive advantage.

States, 469 U.S. 70, 78 (1984). The approach is inappropriate and the result is plainly wrong.

The Government does not attempt to defend the Ninth Circuit's approach. To the contrary, the Government's brief reflects an obvious discomfort with the Ninth Circuit's heavy reliance on legislative history. *E.g.*, Opp. 12 ("Even if resort to the legislative record were appropriate . . . ."). The Government likewise does not defend the Ninth Circuit's reliance upon the two pieces of legislative history that formed the principal basis for the decision below. See Pet. 17-19.[4] Instead, the Government merely points to additional snippets of legislative history which are as inconclusive (or damaging to the BPA's position) as those on which the Ninth Circuit relied.[5] And, most important, the Government does not

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[4] The best the Government can do is to argue that one of those passages—a statement in the House Report regarding the status of Canadian power—does not conclusively *disprove* the Ninth Circuit's hypothesis that Congress intended to permit BPA to discriminate against Canadian non-treaty energy in allocating transmission capacity. Compare Opp. 12-13 with Pet. 18-19. But even this effort fails. Although the Report does "distinguish[] non-Treaty Canadian power from the priority access granted to Canadian Treaty Power" (Opp. 12), it does so by stating, unequivocally, that non-Treaty Canadian power "stands on the same basis as *any* other non-Federal energy." H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 3342, 3350 (emphasis added). "Any other non-Federal energy," of course, includes non-Federal energy produced in the Northwest. See Pet. 18-19.

[5] For example, the Government now relies upon a page of the House Report in claiming that the sole purpose of the "fair and nondiscriminatory" language in the Transmission Act was "to preclude preference utilities [*i.e.*, cooperatives and publicly-owned utilities] from asserting that they had priority over investor-owned utilities to BPA's transmission services." Opp. 15. But the passage on which the Government relies does not remotely support the Government's assertion that this was the *sole* purpose, and any such suggestion is foreclosed by the broad language Congress chose. See *supra* pp. 3-4.

even claim that these passages—or any of the passages relied upon below—provide a "clearly expressed legislative intention" sufficient to override the plain meaning of Section 6 of the Transmission Act.

Thus, the Government, like the Ninth Circuit, has engaged in precisely the kind of erroneous analysis of legislative history that this Court has condemned. As previously explained (*supra* pp. 1-3), the consequence of that error in this case costs Southwest consumers billions of dollars. This Court should grant certiorari to correct that error and, in so doing, to make plain that a reviewing court may not rely upon legislative history to override or "narrow" a statute absent a clearly expressed congressional intention to that effect.

4. Petitioners also demonstrated that there exists a genuine disagreement among the circuits over whether an agency is entitled to the usual degree of deference in interpreting its governing statutes when it has a direct and immediate financial interest in its own decision, and that this disagreement reflects a more general conflict among the circuits over whether an agency is entitled to deference when it has any substantial incentive—pecuniary or otherwise—to misinterpret its organic statute. Pet. 13-15. The Government's initial answer to this argument is to quibble with petitioners' characterization of BPA's operations, claiming that "BPA [does not] operate[] as a traditional business . . . ." Opp. 8, note 3. This answer misses the point. Whether or not BPA is charged with turning a profit versus breaking even and paying back the Treasury, BPA is wholly dependent upon the revenues it collects to fund its operations and to meet its financial obligations. It therefore has a powerful incentive to misinterpret its governing statutes when doing so will have a substantial impact on its revenues—as is the case here.[6]

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[6] Indeed, BPA adopted its Intertie Access Policies principally as a mechanism for increasing its revenues. LTIAP, Administra-

The Government next asserts that this Court has already resolved this issue in *Aluminum Co. of America* v. *Central Lincoln People's Util. Dist.*, 467 U.S. 380, 389 (1984) (*ALCOA*). This is false. The dispute in *ALCOA* was between two BPA customer groups over their relative priority to receive certain BPA power. 467 U.S. at 388. Although the BPA had a temporary, incidental financial interest in the dispute arising from the fact that it had already entered a contract with one of the customer groups (*id.* at 383), it plainly did not have the kind of direct and ongoing financial stake in the interpretation of its governing statute that it has in this case. Here, as Judge Norris observed, the BPA's interpretation permits it to create a highly profitable cartel among itself and non-federal Northwest utilities. Pet. App. B24-B25.

That the Court did not decide the deference issue in *ALCOA* is demonstrated by the *subsequent* decision of the D.C. Circuit in *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987). There, the court observed with respect to the interpretation of a settlement agreement that "if the agency itself were an interested party . . . deference might lead a court to endorse self-serving views that an agency might offer," and that deference would therefore be "inappropriate." *Id.* at 1571. The Government's attempt to distinguish *National Fuel* on the ground that it dealt with the interpretation of a contract rather than a statute is unpersuasive. Agencies are ordinarily entitled to as much (if not more) deference in interpreting contracts subject to their jurisdiction as they are in inter-

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tor's Decision at 8, May 17, 1988 ("Our first concern [in establishing this Policy] was to retain sufficient Federal Intertie capacity for our own use to aid us in meeting our costs, including our Treasury payments."); NTIAP Overview of the Policy at 1, September 7, 1984 ("BPA's Policy enhances BPA's ability to recover revenue."); App. B13 & n. 2, C9, E63-E65.

preting their organic statutes. *E.g.*, *id.* at 1569-70; see also *Tarpon Transmission Co.* v. *FERC*, 860 F.2d 439, 441-42 (D.C. Cir. 1988). Accordingly, there is no reason why the principle articulated in *National Fuel* would apply with any less force in the context of statutory interpretation.

Indeed, the Ninth Circuit itself did not attempt to distinguish *National Fuel* on this or any other ground. It simply stated that it "disagreed" with the D.C. Circuit. See Pet. 14 (quoting App. A13). The Government does not dispute this point. This acknowledged disagreement between two important courts of appeals on an issue of general significance (given the number of federal proprietary agencies) warrants this Court's attention.

The Government's attempt to deny the existence of a square circuit conflict on the more general deference question is similarly erroneous. The Government does not dispute that the Third and Ninth Circuits have squarely held that deference *is* required in reviewing an agency's interpretation of its own authority. See Pet. 15. However, the Government falsely suggests that the D.C. Circuit in *Ohio Power Co.* v. *FERC*, 880 F.2d 1400 (D.C. Cir. 1989), rev'd on other grounds *sub nom. Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990), refused to defer to the FERC's interpretation of a statute because the agency had not claimed deference. In fact, the court refused to defer because, although the statute involved FERC, the statute was not, in the court's view, "entrusted to FERC's administration." 880 F.2d at 1405. This holding reflected the D.C. Circuit's prior ruling in *New York Shipping Ass'n* v. *FMC*, 854 F.2d 1338, 1363 (D.C. Cir. 1988), cert. denied, 448 U.S. 1041 (1989) that it is "inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction . . . ." The conflict on this important issue could not be more apparent or worthy of review.

Finally, the Government's suggestion (Opp. 9) that this Court has already resolved the deference question posed by *Ohio Power* and *New York Shipping* is belied by the fact that the Court recently granted certiorari on—but ultimately did not reach—that very issue in *Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990). See 58 U.S.L.W. 3620 (listing issues presented). The Government's suggestion is further refuted by a comparison between Justice Scalia's concurrence in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988), and Justice Brennan's dissent in that case. See *id.* at 386-87. Their disagreement over the proper interpretation of this Court's prior decisions demonstrates that the issue remains an open one. This case provides an opportunity for the Court to resolve this issue by addressing the more general question of the effect of agency self-interest on judicial review.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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